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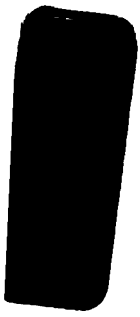
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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON,

DURING THE

MARCH TERM, 1890, AND OCTOBER TERM, 1890.

W. W. THAYER,
CHIEF JUSTICE.

VOL. XIX.

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MARCH TERM, 1890.



CASES
ARGUED AND DETERMINED IN
THE SUPREME COURT
OF
OREGON.

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MARCH TERM, 1890.

[Filed March 16, 1887.]

* C. W. SANFORD, RESPONDENT, *v.* H. W. SANFORD,
APPELLANT.

PUBLIC LANDS—PATENT—COLLATERAL AND DIRECT ATTACK.—In an action of ejectment, a patent for land granted by the United States cannot be collaterally attacked; but it may be attacked by a direct proceeding in equity, based on mistake of the law in its issuance or fraud and imposition in its procurement.

SAME—FRAUD—TRUSTS—INJUNCTION.—Under this rule, where it appeared that after A and B had filed upon separate adjoining tracts of land, A, without the knowledge of B, had his entry amended so as to cover both tracts, notwithstanding B was and had been rightfully in possession of the tract entered by him, and by such means A fraudulently obtained a patent for B's tract; *held*, that A would be considered a trustee of the legal title for B as to such tract, and that an action of ejectment to recover such tract brought by A against B would be enjoined.

APPEAL from the circuit court for Coos county.

A. M. Crawford and *J. F. Watson*, for Appellant.

S. H. Hazard, for Respondent.

LORD, C. J., delivered the opinion of the court.

This is a suit begun by cross-bill to enjoin an action of ejectment brought by defendant, and to have him declared a trustee of the legal title of certain lands described therein. The defendant is the holder of a patent of the

* Omitted from previous volumes by mistake.—[REPORTER.]

Opinion of the Court—Lord, C. J.

United States to said lands under the presumption laws; and the object of the present suit is to charge him as trustee of said property, and to compel a conveyance to the plaintiff. It may be admitted that the facts are not stated in the complaint with much conciseness or precision; but we think they are sufficient as alleged, if proved, to entitle the plaintiff to the relief for which he prays. There can be no doubt but that it is the duty of the officers of the land department to determine upon the facts to whom patents shall be issued for the public lands. The law has intrusted them with the performance of this duty, and, when done, all reasonable presumption must be indulged in support of their action. As to all matters of fact within the scope of their authority, their findings must be taken as conclusive in the absence of fraud and imposition. This doctrine has been expressly affirmed by the highest judicial tribunal of the country. *Johnson v. Tewsley*, 13 Wal. 72; *Moore v. Robbins*, 96 U. S. 530; *Smelting Co. v. Kemp*, 104 U. S. 636.

Hence a patent cannot be collaterally attacked but only by a direct proceeding in equity, based on mistake of the law in its issuance or fraud and imposition in its procurement. "If the officers of the law," said Mr. Justice Field, "mistake the law applicable to the facts or misconstrue the statutes and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. The court in such case merely directs that to be done which these officers would have done if no error of law had been committed. The court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact, concerning which these officers may have drawn wrong conclusions. A judicial inquiry as to the correctness of such conclusion would encroach upon a jurisdiction which congress has devolved exclusively upon the department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case or the

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officers from fully construing it, that a court will look into the evidence. It is not enough, however, that fraud and imposition have been practiced upon the department, or that false testimony or fraudulent documents have been presented. It must appear that they affected its determination, which otherwise would have been in favor of the plaintiff. He must in all cases show that but for the error or fraud or imposition of which he complains he would have been entitled to the patent. It is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for government, which can file its own bills when it desires the cancellation of a patent unadvisedly or wrongly issued." *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. Rep. 782; *Sparks v. Pierce*, 115 U. S. 408, 6 Sup. Ct. Rep. 102.

The application of these principles to the facts in hand are decisive of this case. At the outset it may be said it is clear from the evidence that the defendant has not at any time resided upon or cultivated or improved the land in dispute, or any part thereof. But this of itself is not enough to serve the purpose of the plaintiff. It only shows that the defendant is not entitled to a patent. The law requires the plaintiff to go further and show such a compliance with the law that, but for fraud or imposition of the plaintiff, he would be entitled to and awarded the patent for these lands. In 1871, the defendant, who is a brother of the plaintiff, had settled upon a certain parcel of unsurveyed public lands as a preëmption claim. Adjoining his claim there were other such public lands. With a view to secure it for his brother, who then resided in California, he put in possession of it a friend to temporarily hold it until he could notify his brother and ascertain whether he desired to make a settlement upon it as a preëmption claim. Under this state of facts he wrote to the plaintiff and requested him to come to Oregon and settle upon the adjoining claim. In response to that invitation the plaintiff came for the purpose of settlement upon

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the land, and the defendant pointed it out to him and helped him to build his cabin upon it in furtherance of his settlement. They thus resided upon adjoining claims for several years, the defendant all the while recognizing the settlement of the plaintiff, who, in the meantime, had made improvements, all of which were located on the forty acres now in dispute.

In 1879 the lands settled upon by these parties were surveyed and the plat thereof filed in the land office at Roseburg, when it became known that the tract of land in dispute belonged to that portion of the land settled upon by plaintiff under the circumstances indicated. On September 9th and 27th, respectively, of that year the plaintiff and defendant filed their declaratory statements to the parcels of land upon which they had settled. More than a year afterwards the defendant amended his declaratory statements so as to include the tract in dispute and upon which the plaintiff had resided for quite a number of years, and had built his house and barn and out-houses, set out an orchard, and made other improvements. The evidence shows and the court below finds that this was procured upon the *ex parte* affidavits of the defendant and two witnesses, and without any notice to the plaintiff of the proceeding. It is beyond dispute at this time and when these affidavits were made that the plaintiff was then and had been during the time before mentioned residing upon and improving the identical lands included in this amended statement. By this means the defendant was enabled to procure the patent in fraud of the rights of the plaintiff. And it is clear from the evidence but for such fraud and imposition he would not only have been entitled to but have been awarded the patent.

We have not undertaken to refer to all of the facts in detail. We are satisfied that the decree must be affirmed.

Per Curiam.

[Filed March 22, 1887.]

* HENRY L. PITTOCK, RESPONDENT, v. T. A. JORDAN,
APPELLANT.

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35*	285

CHATTEL MORTGAGE—FORECLOSURE—SHERIFF.—Miscellaneous Laws Oregon, chap. 39, § 2, provides for the foreclosure of chattel mortgages in the manner provided by the mortgage itself, if the mortgage contains any provisions on the subject; otherwise, by the sheriff taking possession and selling. *Held*, that a sheriff cannot justify a possession taken by him under a mortgage providing that in case of default the mortgagee may take possession of the property and sell or otherwise dispose of it upon the ground of acting in his *official capacity* under directions from the mortgagee.

SAME—FILING—PRIORITY.—Under the Oregon statutes in cases of successive chattel mortgages upon the same property, the one first filed is entitled to priority.

APPEAL from the circuit court for Multnomah county.

PER CURIAM.—On June 17, 1885, one G. H. Himes purchased of Tatum & Bowen the printing press in controversy, paying at the time a part of the purchase price, and executing a mortgage on the property purchased to secure the remainder, which provided that, in case of default in payment thereof, Tatum & Bowen might seize the press and make such disposition of it as they deemed best. This instrument was not filed as a chattel mortgage. The property was delivered to Himes in January, 1886. He executed a mortgage on the same and other personal property to the respondent, which was duly filed as such. Himes having failed to pay the balance of the purchase price, T. & B. in December, 1886, directed the appellant to take the printing press for them, remove it from Himes' office by virtue of their mortgage, and sell the same to pay the balance due them. Thereupon the respondent brought this suit to enjoin the defendant from removing the mortgaged property or proceeding with the sale. The appellant in his answer attempts to justify by setting up that he is the sheriff of Multnomah county, and that as such he was acting under the direction of said T. & B., and by virtue of their said chattel mortgage. By section 2, chapter 39, Miscellaneous Laws, 688, it is provided:

* Omitted from previous volumes by mistake.—[REPORTER.]

Per Curiam.

"Whenever, in any mortgage of goods and chattels, the parties to such mortgage shall have provided the manner in which such mortgage may be foreclosed, such mortgage, upon breach of the conditions thereof, may be foreclosed in the manner therein provided, *and not otherwise*; and if, in such mortgage, the manner in which the same may be foreclosed shall not be provided, then, upon breach of the conditions thereof, in case the consideration thereof shall not exceed five hundred dollars, the same may be foreclosed and the mortgaged property sold by the sheriff," etc. Here the manner in which said mortgage might be foreclosed in case of default is provided in the mortgage, and therefore the defendant, as sheriff, had no power or authority in the matter. He was no more than an intruder, and his official character could be no protection to him whatever. Where, as in this case, the mortgagee is empowered, upon default, to take possession of the property and sell or otherwise dispose of it, he may appoint an agent to take charge of the property for him; but, except in the cases specifically designated in the statute, he cannot call to his aid the official character of the sheriff or other officer named therein. The claim of the appellant that a chattel mortgage given in good faith is valid as against a subsequent mortgagee of the same property, whose mortgage is first duly filed, is untenable. Without entering at large upon this subject, it suffices to say that the obvious purpose of the several statutory provisions relating thereto is, in conflicting claims between mortgagees of chattels, to give priority to him whose mortgage is first duly filed as required by law.

Let the decree be affirmed.

Opinion of the Court—Strahan, J.

[Filed May 18, 1889.]

***TOWN OF PENDLETON, RESPONDENT, v. R. SAUNDERS ET AL., APPELLANT.**

19	9
133	183
19	9
138	304

CONTRACT—CONSTRUCTION.—When the town of Pendleton contracted to pump water into a reservoir to the full capacity of its pumps whenever the first parties to the agreement desired to make a test of the reservoir not exceeding once each week for ninety days, such agreement did not impose the duty on said town of doing more than run its pumps to their full capacity during the time they were usually and reasonably run. It was not required to incur extraordinary or unusual expense for that purpose or to increase its force of engineers, if the one then employed was capable of running the pumps to their full capacity during the hours he was accustomed to run the same. If the supply of water failed for any cause without the city's fault, so that the reservoir could not be filled at the times required by B. and C., such failure did not put the city in default. If the cistern from which the supply of water was drawn was inadequate, or if, on account of the season, there was a scarcity of water, the city would not be responsible therefor.

RESERVOIR—TESTS OF.—The "tests" provided for in the agreement were designed for the equal benefit of both parties, and their purpose was to enable both parties to know by actual experiment when the reservoir was completed by being water-tight.

CONTRACT—OBLIGATION.—So far as either party to the contracts mentioned in the pleadings has bound himself, he must substantially perform his agreement, and neither is bound beyond the terms of his agreement.

CONTRACT—SENSE IN WHICH WORDS ARE USED.—Language used in a contract must generally be held to be used in its ordinary and usual sense and signification, but when such rule would give the language no force or effect whatever, or would lead to an absurdity, the court may examine the context and view the whole subject matter in the light in which the parties evidently viewed it, and ascertain the meaning of the language they used by their situation, the subject matter of the contract, the context, and all the circumstances attending the execution of such contract.

EXPERT TESTIMONY—OPINION OF WITNESSES—WHEN COMPETENT.—Subdivision 9 of section 706, Hill's Code, makes the opinion of a witness competent evidence respecting the identity or handwriting of a person where he has knowledge of the person or handwriting; and also his opinion on a question of science, art, or trade, when he is skilled therein.

WITNESS—EXPERT.—An expert is one instructed by experience, and to become such requires a course of previous habit and practice or of study so as to be familiar with the subject.

APPEAL from the circuit court for Umatilla county.

J. C. Leasure and J. J. Balleray, for Appellants.

L. B. Cox, for Respondent.

STRAHAN, J., delivered the opinion of the court.

The object of this suit is to recover damages against the defendants for the alleged violation of the conditions of a certain bond executed by the defendants to the plaintiff. It appears from the complaint that on the eleventh

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day of November, 1886, the defendants, Saunders and Church, contracted with the plaintiff to construct, build, erect and put in for the plaintiff, in accordance with certain specifications, a system of water-works, including a reservoir, which they agreed should be constructed and built pursuant to the said specifications; and should have when built, the capacity of holding 500,000 gallons of water, and be water-tight; and for such system of water-works, built according to such plan and specifications, the plaintiff was to pay them \$25,375 in bonds of the town of Pendleton, which were to be received by the contractors in payment at 6 per cent above par; that said Saunders and Church entered upon the performance of said contract and did build and put in a system of water-works for the plaintiff pursuant to said agreement and substantially in accordance with the specifications therefor in all respects save and except that the said Saunders and Church failed and neglected to dig, build and construct a reservoir for water which should contain and hold 500,000 gallons, and have the capacity for holding so much water, and be water-tight; and did notify this plaintiff and claim that they had completed said system of water-works, pursuant to such contract, and did call upon the plaintiff for the contract price of the same; that plaintiff examined said system of water-works, and particularly their reservoir, and finding the same not built according to said contract, and particularly that the said reservoir was not built pursuant to the specifications therefor, and not water-tight, did refuse to accept said system of water-works and to pay the balance of the contract price for the same, and at said time plaintiff had paid Saunders and Church, on said agreement, the sum of \$22,200 in bonds of the town of Pendleton, at the agreed price of 6 per cent above par, and there still remained unpaid upon said contract price the sum of \$3,115, which plaintiff refused to pay over to Saunders and Church, because of their default in putting in said system of water-works according to contract, and particularly because of their failure to construct

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a reservoir pursuant to said contract, and make the same water-tight as required by the specifications; that Saunders and Church, for the purpose of inducing plaintiff to accept the system of water-works so constructed, and particularly to induce the plaintiff to pay them the balance of the contract price of said system of water-works, entered into a new contract with plaintiff, as follows:

“This agreement, made and entered into by and between C. P. Church and R. Saunders, as partners under the firm name of Saunders & Church, parties of the first part, and the committee on fire and water of the town of Pendleton, composed of W. F. Matlock, E. Reith and S. Rothchild, parties of the second part—witnesseth:

“That the parties of the first part, for and in consideration of the acceptance by the town of Pendleton of the water-works system, constructed for said town by the parties of the first part, in its present condition, and the payment by the town of Pendleton to the said first parties of the sum of the water bonds of the town of Pendleton, in the denominations of one thousand dollars each, and numbered 22, 23, 24, 25, 26, 27, 28, and 29, and of the sum of one hundred and ninety-two and forty-eight one-hundredths dollars, by warrant drawn on the town treasury, that being the balance of the price agreed upon by the first and second parties as due to said first parties from said second parties upon the full and complete completion of said water-works system, the parties of the first part agree to and with said second parties that within ninety days from the date of the signing of the contract the reservoir of the water-works system of the town of Pendleton shall contain at least 500,000 gallons of water, or as much as can be put in the reservoir by pumping, and that said reservoir, when containing 500,000 gallons of water or as near thereto as possible, shall not lose from evaporation and filtration more than one and one-half inches of water, vertical measure, during each twenty-four hours, and that if said reservoir, when containing said amount of water, at the expiration of said ninety days,

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shall lose more than one and one-half inches of water by filtration and evaporation during each twenty-four hours, then that the said first parties shall, at their own cost and expense, within twenty days thereafter, make said reservoir water-tight by walling up the north, east and west walls of the same with hard-burned brick laid in cement mortar, and shall plaster the same with cement and black sharp sand, mixed in the customary proportions for cementing cisterns, on the inside of the walls of said reservoir to a depth of at least three-eighths of an inch.

“That the parties of the first part make, sign, execute and deliver to the town of Pendleton a good and sufficient bond in the penal sum of \$4,000, with two or more sureties, to be approved by the common council, conditioned for the faithful performance of their part of the terms of this agreement.

“That the parties of the second part, for and in consideration of the covenants and agreements of the first parties herein mentioned and by them to be kept and performed, hereby agree to and with said parties, not as individuals, but for and on behalf of the town of Pendleton, to accept for said town, subject to the conditions and covenants mentioned in this agreement, the water-works system constructed for the town of Pendleton by the first parties in the condition the same is now in, and to pay and deliver upon the filing of this contract, duly signed and executed by the parties thereto, accompanied with the bond of the first parties, heretofore mentioned, with the recorder of the town of Pendleton and the approval of the same by the common council, water bonds of the town of Pendleton, in denominations of one thousand dollars each, and numbered 22, 23, 24, 25, 26, 27, 28, and 29, also a warrant of said town, drawn on the town treasurer, for the sum of one hundred and ninety-two and forty-eight one-hundredths dollars.

“And it is further understood and agreed, by and between the parties to this agreement, that during the time mentioned in this agreement for the completion of

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said reservoir, that the town of Pendleton will pump water into said reservoir to the full capacity of its pumps (except what water shall be needed for consumption in said town) whenever the first parties may desire to make a test of said reservoir, not exceeding once each week; and that the said first parties shall have the right during said time to bleed the reservoir as often as they may deem it necessary for the repairing of the same; and it is further understood and agreed by and between the parties to this agreement that W. F. Matlock, E. Reith, and S. Rothchild, parties of the second part, in the signing and execution of this agreement, assume no personal responsibility, and are not to be held in any way personally liable thereon, but that they sign and execute the same for and on behalf of the town of Pendleton.

“In witness whereof, the parties have hereunto set their hands and seals this twenty-first day of June, 1887.

“1. SAUNDERS & CHURCH.	[L. S.]
“4. W. F. MATLOCK.	[L. S.]
“2. E. REITH.	[L. S.]
“3. S. ROTHCHILD.	[L. S.]

“In the presence of:

“JOHN J. BALLERAY.

“THOS. FITZGERALD.

“As to signatures 1, 2, and 3, 4.”

That the foregoing agreement is the agreement or contract between Saunders and Church and the town of Pendleton mentioned in the bond hereinafter set forth; that on the seventeenth day of June, 1887, the defendants duly made and executed to the plaintiff their certain bond in the words and figures following, to wit:

“Know all men by these presents: That we, C. P. Church and R. Saunders, Zoeth Houser, Lee Moorhouse, C. B. Wade, and W. T. Chalk are held and firmly bound unto the town of Pendleton in the just and full sum of four thousand dollars (\$4,000), for the payment of which sum to the said town of Pendleton, we, and each of us, do by

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these presents, bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Signed with our hands and sealed with our seals this seventeenth day of June, A.D. 1887.

“The condition of the above obligation is such that, whereas, the above bounden C. P. Church and R. Saunders are about to enter into a contract with the town of Pendleton, supplementary to the contracts now existing between said C. P. Church and R. Saunders, on one part, and the said town of Pendleton on the other, providing for the construction of the system of water-works in the said town, which contract bears date, or is to bear date, the twenty-first day of June, A.D. 1887, and which contract provides for the doing of certain work on the reservoir belonging to said water system, in case the same shall be necessary to make said reservoir water-tight; now, therefore, if said C. P. Church and R. Saunders shall strictly conform to and perform all their covenants contained in said contract, and abide by and perform all the covenants and conditions therein contained on their part, then this obligation to be and become void, otherwise to be and remain in full force and virtue. Signed and sealed the day and year above written.

“CHARLES P. CHURCH. [L.S.]

“R. SAUNDERS. [L.S.]

“ZO. HOUSER. [L.S.]

“LEE MOORHOUSE. [L.S.]

“C. B. WADE. [L.S.]

“W. T. CHALK. [L.S.]

“Signed, sealed and delivered in presence of.

“JOHN J. BALLERAY.

“W. E. CREWS.

“G. W. PITTOCK.

“P. E. GEROULD.”

That said bond was, on the twenty-third of June, 1887, approved by the common council of the town of Pendleton; that at said time there remained due the contractors from

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the town of Pendleton, \$3,115, and also \$5,567.48 for extra material and labor, and plaintiff thereupon paid the same, as per said agreement herein set forth, and plaintiff has performed all other conditions and promises by it on its part to be performed, pursuant to the agreement set forth; that defendants C. P. Church and R. Saunders have not performed nor observed the conditions of the above-stated agreement nor the promises on their part to be observed and performed, but have made default therein; that said reservoir has never had the capacity to contain 500,000 gallons of water without losing more than one and one-half inches of water, vertical measure, by filtration and evaporation during each consecutive twenty-four hours nor less than eleven inches, vertical measure, during such period; that the defendants R. Saunders and C. P. Church were duly notified and well knew the condition of said reservoir and the fact that the same was not water-tight and would not, at the expiration of the ninety days specified, contain the said amount of water without losing more than one and one-half inches of water, vertical measure, by filtration and evaporation during each consecutive twenty-four hours nor less than twenty four inches; but have failed, neglected and refused to make said reservoir water-tight, and have failed, neglected and refused to wall up the north, east and west walls of said reservoir, and to cement the same or to do any act or thing to make said reservoir water-tight, or to observe or perform the conditions of said contract or bond, and still neglect and refuse so to do; and by reason thereof, the conditions of said bond have become broken, and the obligation has become absolute and plaintiff is damaged in the sum of \$2,270; that by reason of the default of the said C. P. Church and R. Saunders in constructing said reservoir and in making the same water-tight, as provided in the written agreement of June 21, 1887, above set forth, plaintiff was compelled to run its pumps constantly in order to keep a supply of water in said reservoir and to furnish its cisterns with water, and was compelled to employ for such purpose other and extra

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labor, to wit, an additional engineer, for the period of one hundred and twelve days, and did actually pay as wages for the same the sum of \$281, and plaintiff is specially damaged in said sum of \$281; that by reason of the said default of the said C. P. Church and R. Saunders, and by reason of said reservoir failing to hold the water pumped into it, plaintiff was compelled to run its pumps and engine constantly in order to keep a supply of water in said reservoir and to furnish its customers with water, and was compelled to use and burn much larger quantities of wood, to wit, 112 cords, and that said wood was reasonably worth \$4.49 per cord, and plaintiff was thereby specially damaged in the sum of \$502.88; that by reason of the default of said Saunders and Church, the plaintiff was compelled to run its engine at a higher pressure than it would have run the same and drive its pumps at a greater rate of speed, and frequently it was compelled to shut the water off from the reservoir and to supply its customers with water directly from its pumps, and by reason thereof plaintiff's engine and pumps were much worn and damaged and plaintiff was thereby damaged in the further sum of \$200. Said complaint was duly verified and filed.

To this complaint defendants filed a general demurrer, and the demurrer having been overruled, the defendants answered. By the answer defendants admit the contract made by Saunders and Church with plaintiffs, dated November 11, 1886, and that Saunders and Church proceeded under the same to construct a system of water-works for plaintiff, and gave notice to plaintiff that they had completed the same. They admit that at the time Saunders and Church gave notice to plaintiff of the completion of said water-works they had been paid the sum of \$22,200, and there was still due on the said contract the sum of \$3,115, and the further sum of \$5,567.48 for extra work and for material. They admit that on the seventeenth day of June the defendants executed the bond set out in plaintiff's complaint, and that on the execution of said bond the plaintiff paid to Saunders and Church the

sums then due them. The answer then denies specifically every other allegation of plaintiff's complaint, including the alleged inducement for signing the contract and bond sued on in this cause and set out in plaintiff's complaint.

Defendants alleged, in their answer, the following new matter: That at the time said Saunders and Church gave such notice and made such demand (that is, gave notice that they had completed their contract and demanded the balance then due them), they had completed said system of water-works including said reservoir according to the said contract and said plans and specifications therefor; that plaintiff being unprepared at the time of the completion of said work to make a test thereof, and being unwilling to accept the same without such test, and refusing to pay said Saunders and Church the balance of the contract price for said work, namely, the sum of \$3,115, besides the sum of \$5,567.48 due said Saunders and Church for extra work and materials, and said Saunders and Church being about to sue the plaintiff for said sums due them, the plaintiff and defendant, to avoid litigation, entered into the contract set up in plaintiff's complaint; that after the making of the contract mentioned in plaintiff's complaint, dated November 11, 1886, by and between Saunders and Church and the plaintiff herein, the said Saunders and Church did build and construct for plaintiff the said system of water-works in the town of Pendleton, including the reservoir belonging to said system, in strict accordance with the plans and specifications which formed a part of said contract, except where the same were changed by the direction and at the request of plaintiff, and did build and construct said reservoir so that the same had a capacity of and was capable of holding more than 500,000 gallons of water, and was when holding such quantity of water and at all times water-tight, and said Saunders and Church thereupon demanded of plaintiff the balance of the contract price of said system of water-works, which then amounted to \$3,115, and the price of extra work done thereon and material furnished therefor, which amounted to the sum of \$5,567.48; that

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plaintiff, without any just cause or reason therefor, declined to pay said sums due said Saunders and Church and declined to test and receive said system of water-works till Saunders and Church would enter into and sign the contract of June 21, 1887, and furnish the bond, which is set out in plaintiff's complaint; that after the signing of said agreement and bond set out in plaintiff's complaint, the defendants Saunders and Church, during the time therein mentioned and provided for the completion of said reservoir, repeatedly requested plaintiff to pump water into said reservoir to the full capacity of its pumps (except what water was needed for consumption in said town), in order to make tests of said reservoir, but the plaintiff neglected and refused, at all times, to comply with said request; that within ninety days from the signing of said contract of June 21, 1887, the said reservoir was capable of containing and did contain 500,000 gallons of water, and did not lose from evaporation and filtration more than one and one-half inches of water, vertical measure, during each or any twenty-four hours, and was then and has been ever since water-tight; that said Saunders and Church have kept and performed on their part all the provisions and promises contained in said agreement of June 21, 1887, set out in plaintiff's complaint, which were to be kept and performed on their part, and that none of the conditions of said bond set up in the plaintiff's complaint and on which this action was brought have been broken.

The reply put in issue the new matter contained in the answer. A trial before a jury resulted in a verdict and judgment for the plaintiff in the sum of \$2,250, from which judgment this appeal is taken. The notice of appeal contains twenty-six assignments of error, but those only which were specially insisted upon at the argument here will be noticed.

1. The liability of the defendants in this action must be measured by the contract which Saunders and Church made with the plaintiff dated June 21, 1887, and the bond made pursuant thereto, signed by all of the defendants,

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dated June 17, 1887. Though bearing different dates, these writings were delivered at the same time, took effect simultaneously, and must be construed together as a part of the same transaction. By the first Saunders and Church covenanted with the plaintiff that upon the full and complete completion of said water-works system the parties of the first part agree to and with said second parties that within ninety days from the date of the signing of the contract the reservoir of the said water-works system of the town of Pendleton shall contain at least 500,000 gallons of water, or as much as can be put in the reservoir by pumping; and that said reservoir, when containing 500,000 gallons of water or as near thereto as possible, shall not lose from evaporation and filtration more than one and one-half inches of water, vertical measure, during each twenty-four hours; and that if said reservoir, when containing said amount of water, at the expiration of said period of ninety days, shall lose more than one and one-half inches of water by filtration and evaporation during each twenty-four hours, then, that the said parties shall at their own cost and expense within twenty days thereafter make said reservoir water-tight by walling up the north, east, and west walls of the same with hard-burned brick, laid in cement mortar, and shall plaster the same with cement and black, sharp sand, mixed in the customary proportion for cementing cisterns, on the inside walls of said reservoir, to the depth of at least three-eighths of an inch. The bond signed by all the defendants recites the making of this contract, and then continues: "And which contract provides for the doing of certain work on the reservoir belonging to said water system, in case the same shall be necessary to make said reservoir water-tight. Now, therefore, if said C. P. Church and R. Saunders shall strictly conform to and perform all of their covenants contained in said contract, *and abide by and perform all the covenants and conditions therein contained on their part*, then this obligation to be and become void, otherwise to be and remain in full force and virtue." The agreement made

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between Saunders and Church with the town of Pendleton also contained the following provision: * * *

“That during the time mentioned in this agreement *for the completion of said reservoir* the town of Pendleton will pump water into said reservoir to the full capacity of its pumps, except what water shall be needed for consumption in said town, whenever the first parties may desire to make a test of said reservoir, not exceeding once each week, and that said first parties shall have the right during said time to bleed the reservoir, etc.” These provisions of the contracts between the parties necessarily assume that, although the possession of the system of water-works had passed from the contractors to the town of Pendleton, the reservoir was incomplete, and they provide for a time within which the contractors might complete it, that is, make it water-tight. A means of making certain tests is also provided, that is, the town of Pendleton will pump water into said reservoir to the full capacity of its pumps whenever the first parties may desire to make a test of said reservoir, not exceeding once in each week; but this provision did not impose the duty on the town of Pendleton of doing more than to run its pumps to their full capacity during the time they were usually and reasonably run. It was not required to go to extraordinary or unusual expense for that purpose, or to increase its force of engineers, if the one already employed was capable of running the pumps to their full capacity during the hours he was accustomed to run the same. If the city did all of this it performed the full measure of its duty in this particular and was not in default. If the supply of water failed for any cause without the city’s fault, so that the reservoir could not be filled at the time required by Saunders and Church, such failure did not put the city in default. Its agreement was to run its pumps, and I have indicated the extent of its duty in that particular; but if the cistern from which the water was drawn was inadequate, or if, on account of the season, there was a scarcity of water, the city would not be responsible therefor. The

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city had as much interest in these tests as had Saunders and Church. They were designed for the equal benefit of both parties. The undoubted object was to enable them to know by actual experiment when the reservoir was completed by being water-tight. But I do not think the terms of this contract bring the case within the principle laid down in the numerous cases cited by appellant's counsel on that subject. Those cases state elementary law, and their authority and binding force is fully recognized and admitted, but they are not applicable to the particular facts disclosed by this record. So far as either party to this record has bound himself to perform any act or thing, we hold he must substantially perform his agreement, and that neither is bound beyond the terms of his contract, and this is the substance of all the authorities cited on this subject by appellant's counsel. Without entering into a more particular specification, these general observations dispose of a number of the assignments of error by the appellants, adversely to them. A more particular specification would tend to too great prolixity, and I deem it unnecessary.

2. But there is one charge given by the court to which an exception was taken, which is not covered by what has been said; which charge is as follows: "If you find that the supply pipe of the reservoir did allow water to escape through its gates, and that such escape was due to the failure of the gates to shut by reason of gravel getting into the pipe, and if you further find that such gravel got into the pipe from the reservoir after the twenty-first day of June, 1887, and before the expiration of ninety days, by reason of its imperfect construction, and in its ordinary use, I instruct you that such loss was within the scope of the undertaking of the contractors, and they are to be held responsible therefor. I charge you that filtration, in the sense used in these instructions, means leakage from the reservoir from any cause owing to its defective construction, and its incapacity by reason thereof to hold water."

Further on in this charge the court remarked on the same subject: "The burden of proof is upon the plaintiff, the town of Pendleton, to show that at the expiration of the ninety days mentioned in the contract, the reservoir lost by evaporation and filtration, and from no other cause, one and one-half inches of water in twenty-four hours."

Appellants' counsel contend that the word *filtration* used in the contract is there used in its ordinary sense, and that these instructions are erroneous because they assume that it was used in a different sense. The ordinary rule undoubtedly is that language used in a contract is to be understood and held to be used in its ordinary and usual sense and signification; but within that rule this word would have no signification whatever. The meaning ascribed to it by lexicographers is "the act or process of filtering; the mechanical separation of a liquid from the undissolved particles floating in it"; and the process of filtering is defined "to purify or defecate, as liquor, by causing it to pass through a filter, or porous substance that retains feculent matter." In the sense in which the word is used in the contract it plainly imports a method of losing water from the reservoir. The words are: "Shall not lose from evaporation and *filtration* more than one and one-half inches," etc. To claim that the word in this connection can have or was designed to have its ordinary signification, is an absurdity.

Looking at the subject matter of this contract, its object, the situation and surroundings of the parties, and particularly the connection in which the word occurs therein, we are not prepared to say the court misinterpreted it to the jury. The only question that does not seem clear to us is whether or not it is admissible in such case to employ interpretation at all; but looking at the whole subject matter in the light in which the parties evidently viewed it when they made the contract, we think that we may properly look for the meaning of the words they used in the context and in the surroundings and situation of the

parties and the subject matter itself. Thus viewing the matter, we are not satisfied that the court erred in its charge to the jury now under consideration. Section 700 of the Code aids this view of the matter. By that section it is provided: "When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it; and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made."

3. The defendants took some exceptions to the introduction of evidence, which requires notice. R. A. Habersham, who has been a practical civil engineer for thirty years, was called by the plaintiff and testified without objection, in substance: "I was at the reservoir of the town of Pendleton yesterday. I have the elevation of the hill on which it is situated. I found the top of the reservoir wall about one hundred and forty feet above the pumping house. I took it with a barometer. That is a recognized mode of taking elevations. I have had experience in blasting and digging out excavations in the ground and in soil of the same character as that out of which the reservoir was digged. The effect of blasting is to shake up and loosen such ground, and might have a tendency to give rise to fissures and apertures in the surrounding earth. I have made a test to determine as to whether rock of the character as that out of which the reservoir was digged would resist leakage of water. I tested some of the same rock by putting it in water for twenty-four hours. When I took it out some of the pebbles still stuck together, but generally it had fallen apart and showed no evidence of having anything in the nature of cement in it. The *matrix* in which the pebbles were enveloped is mostly volcanic ash, with very little cohesiveness about it. I have had experience in building walls to resist water. If the material into which the reservoir is excavated is solid, whether it be earth or hard pan, it would not require any

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brick or stone lining at all. It would be sufficient to plaster it with cement to prevent absorption. If it is necessary to make a wall on account of one weak spot in the excavation, then a wall (provided the backing is put in well and made solid before any masonry is begun), four inches of brick, laid in good cement, and laid as you describe, would be sufficient; but this estimate makes no allowance for any unfaithful or bad work. It must be absolutely sound. For a proper backing I should want a stone backing, or else clay rammed in hard. Irregularities in the side I should have filled in with either concrete or good hard clay, well tamped in." After further describing the backing necessary to make the wall safe, etc., the plaintiff's counsel asked the witness the following question: "I would ask you to state what effect freezing would have on the wall you speak of?" This was objected to and the objection overruled and an exception taken, and the witness then answered: "It would be liable to crack the wall."

The witness further testified under exception: "The hole in which the reservoir is built, not being water-tight, the reservoir would leak down to the bottom of this crack, and if the clay support were to continue alternately freezing and thawing, it would break off in the neighborhood of that soft place. The tendency would be to yield at all parts of the wall within the reach of this breaking up." This witness also, under exception, gave his opinion to the jury on several similar points in the controversy.

Frank Duprat, Felix Roumagoux, and R. Paschal, who were stone-masons, and who constructed the walls in the reservoir for the city, to make the same water-tight, were each asked various questions tending to elicit their opinions as to the kind of walls necessary to be reasonably safe and durable, what would be the effect upon the wall of water running behind it and freezing, etc.; and to each and all of these questions the defendants' counsel objected, for the reason that the same was irrelevant and immaterial, which objections being severally overruled, exceptions

were duly taken. A. J. Ford, who was a brick-mason and had had experience in building cisterns and walls, also gave his opinion as to the kind of a wall that would be water-tight and reasonably durable.

If these were not proper subjects for expert evidence, or if the several witnesses offered did not possess the requisite knowledge to enable them to give an opinion, the evidence offered should have been excluded on the ground of its incompetency; but counsel did not make that objection. They relied upon its immateriality and irrelevancy, and insisted on no other objections.

Under the plaintiff's view of this case, this evidence was both relevant and material. It tended to show the nature and character of the wall the plaintiff was required to construct in order to make the reservoir reasonably durable and water-tight. It was material and relevant as tending to show the extent of the labor and material which were necessary to construct such wall, and which would, to some extent, aid the jury in determining the amount the plaintiff was required to expend in its construction. But allowing the defendants the benefit of the other objection,—that such evidence was incompetent,—still the exceptions could not be sustained.

Section 706 of Hill's Code provides: "In conformity with the preceding provisions, evidence may be given on the trial of the following facts:

* * * * *

"9. The opinion of a witness respecting the identity or handwriting of a person when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein." * *

This statute merely indicates the general rule admitting expert testimony, and I think all the testimony to which exceptions were taken, on the subject indicated, were of that nature. Each of the witnesses appeared to be skilled in the particular science, art, or trade, to which the questions related. "An expert is one instructed by experience, and to become one requires a course of previous habit and

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practice, or of study, so as to be familiar with the subject.” *Nelson v. Sun Mutual Insurance Company*, 71 N. Y. 453.

‘An expert must have made the subject upon which he gives his opinion a matter of particular study, practice or observation; and he must have particular, special knowledge on the subject.” *Jones v. Tucker*, 41 N. H. 546. “Knowledge of any kind, gained for and in the course of one’s business as pertaining thereto, is precisely that which entitles one to be considered an expert, so as to render his opinion, founded on such knowledge, admissible in evidence.” *Buffum v. Harris*, 5 R. I. 250. And 1 Greenleaf’s Ev., section 440, is an authority to the same point. All of the evidence offered on the subjects indicated above was clearly admissible, and a more particular discussion of the subject would be unprofitable and is unnecessary.

4. A point was made during the argument here, that the writings sued on were without consideration, and the same question was made prominent during the trial in the court below; but I am unable to discover any force in the appellant’s contention on this point. The writings declared on are under seal, and seal always imports a consideration; but that is not all. The mutual covenants and agreements of the parties are a sufficient consideration to support such mutual promises.

The judgment of the lower court is affirmed.

[UPON RE-HEARING.—Filed June 10, 1890.]

THAYER, C. J., delivered the opinion of the court.

This case was argued, submitted and decided at the last term of this court sitting at the town of Pendleton. Some doubt prevailed, however, in the minds of some of the members of the court as to the correctness of the conclusions arrived at, consequently it was concluded to grant a re-hearing. The facts of the case are pretty fully set out in the opinion rendered at the former hearing; but as it will enable me more clearly to express my views in regard to it, I shall briefly advert to them.

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The appellants, with certain other persons as their sureties, on the seventeenth day of June, 1887, executed to the respondent a bond or obligation for the payment to the respondent of the sum of \$4,000. Said bond contained the following condition and recital:

“The condition of the above obligation is such, that, whereas, the above bounden C. P. Church and R. Saunders are about to enter into a contract with the town of Pendleton, supplementary to the contract now existing between said C. P. Church and R. Saunders, on one part, and the said town of Pendleton on the other, providing for the construction of the system of water-works in said town, which contract bears, or is to bear, date the twenty-first day of June, A.D. 1887, and which contract provides for the doing of certain work on the reservoir belonging to said water system, in case the same shall be necessary to make said reservoir water-tight. Now, therefore, if said C. P. Church and R. Saunders shall strictly conform to and perform all their covenants contained in said contract, etc., then this obligation to be and become void,” etc.

The agreement referred to in the bond contained the following stipulations:

“That the parties of the first part, for and in consideration of the acceptance by the town of Pendleton of the water-works system constructed for said town, by the parties of the first part, in its present condition, and the payment by the town of Pendleton to said parties of the sum of water bonds by the town of Pendleton, in the denomination of one thousand dollars each, and numbered 22, 23, 24, 25, 26, 27, 28, and 29, and of the sum of one hundred and ninety-two and 48-100 dollars, by warrant drawn on the town treasurer, that being the balance of price agreed upon by the first and second parties as due to said first parties from said second parties upon the full and complete completion of said water-works system, the parties of the first part agree to and with said second parties that within ninety days from the date of the signing of this contract the reservoir of the water-works system of

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the town of Pendleton shall contain at least five hundred thousand gallons of water, or so much as can be put into the reservoir by pumping; and that said reservoir, when containing said 500,000 gallons of water or as near thereto as possible, shall not lose from evaporation and filtration more than one and one-half inches of water, vertical measure, during each twenty-four hours, and that if said reservoir, when containing said amount of water, at the expiration of said period of ninety days shall lose more than one and one-half inches of water, by filtration and evaporation, during each twenty-four hours, then that the said first parties shall, at their own cost and expense, within twenty days thereafter, make said reservoir watertight by walling up the north, east and west walls of the same with hard-burned brick, laid in cement mortar, and shall plaster the same with cement and black, sharp sand mixed in the customary proportions for cementing cisterns on the inside of the walls of said reservoir to a depth of at least $\frac{3}{4}$ of an inch.

“And it is further understood and agreed by and between the parties to this agreement that during the time mentioned in this agreement for the completion of said reservoir, that the town of Pendleton will pump water into said reservoir to the full capacity of its pumps (except what water shall be needed for consumption in said town) whenever the first parties may desire to make a test of said reservoir, not exceeding once each week, and that the said first parties shall have the right during said time to bleed the reservoir as often as they may deem it necessary for the repairing of the same.”

These provisions of the said bond and contract indicate very clearly the status of the affair between the parties at the time of their execution.

The appellants had contracted with the respondent to construct and put in for the latter a system of water-works, including a reservoir, which reservoir was to be built according to certain specifications, was to have the capacity of holding 500,000 gallons of water and be water-

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tight. They had ostensibly, I suppose, completed the works and were claiming that they were entitled to their pay. The officers of the city having the charge of the business were probably suspicious that the reservoir might not be water-tight, hence they withheld payment until the bond and supplemental agreement were executed. They thereby evidently sought to secure to the city a full compliance upon the part of the appellants with the terms of the original contract in the respect mentioned; and the rights of the parties in the premises depend upon the construction of the supplemental contract, which must be construed in view of the surrounding facts and circumstances.

The parties understood, no doubt, that it might be necessary to wall up the said three sides of the reservoir and plaster the walls, as provided in the supplemental contract, in order to render it water-tight, and the time and opportunities agreed to be given to the appellants to test and examine it were for the purpose of enabling them to ascertain with certainty whether or not it was necessary to do that. The important consideration in the matter was to secure a water-tight reservoir; the appellants had agreed in the original contract to construct such an one, and they were not relieved from the obligation by the supplemental contract. The object and purpose of walling up the sides and doing the plastering as therein provided were to secure that result, which the parties evidently supposed would accomplish it beyond peradventure. The language of the instrument is that the said appellants shall "make said reservoir water-tight by walling up," etc. The respondent agreed, it is true, that it would pump water into the reservoir to the full capacity of its pumps ("except what water shall be needed for consumption in said town") whenever the first parties may desire to make a test of said reservoir, not exceeding once each week, and that said first parties should have the right during said time "to bleed the reservoir" as often as they might deem it necessary. This imposed an obligation upon the

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respondent, but I doubt very much whether it was such an one that neglect upon the part of the respondent to observe it would constitute a defense in favor of the appellants in an action against them for a breach of the original contract to construct a water-tight reservoir. It certainly would not unless such neglect could be construed into a positive acceptance by the respondent of the reservoir in the condition it was in at the time of the execution of the supplemental contract, although it would have been a good answer to a charge by the respondent of a failure on the part of the appellants to build the wall and do the plastering in the absence of clear proof that the reservoir could in no other manner be made water-tight. Under either of these contracts the appellants were obligated to construct a reservoir which would hold water. The second contract differs from the first one only in its prescribing the mode in which the reservoir was to be made water-tight. The importance of its being so made is obvious. A leaky reservoir constructed for the purpose of supplying a town with water would be worthless and render the water system, which it was intended to maintain, a total failure. The parties to the said contracts understood this perfectly, and had the fact in view at the time of their execution.

The appellants' counsel insist that if a contract is not ambiguous or uncertain it is the duty of the court to take the contract as it finds it, and enforce the stipulations which the parties themselves have made, as they are only bound to the extent of those stipulations. If the counsel mean by this that the courts in their construction of contracts are bound by the literal words contained therein, taken according to their strict signification, they are very wide of the mark. If the intention of the parties to the contract is manifest, of course "the court should enforce the stipulation which they themselves have made." A knowledge of such intention cannot always, however, be gained from the abstract meaning of the language which the parties employ in their contracts, but must be ascer-

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tained many times from the idea which was sought to be conveyed by the use of it. Nor should the interpretation of the language be confined to its specific meaning, as general words, in a contract or other instrument, often imply important obligations that are binding upon the parties.

The case in hand furnishes a good illustration of the principle suggested. The appellants in the original contract with the respondent undertook to build and construct a reservoir which should be water-tight. The terms of the undertaking were general, yet an implied obligation was thereby created to the effect that the appellants would do whatever might be necessary to make such water-tight reservoir. If, therefore, it were necessary, in order to prevent the reservoir from leaking, to wall up the four sides thereof, and plaster the entire inside "with cement and black sharp sand," they were just as much obligated to do it under the general terms of the contract as they would have been had it been definitely specified therein. And I think the language of the second contract, read by the light of surrounding circumstances, was sufficiently broad to require the appellants, in case it were necessary to render the reservoir water-tight, to construct permanent and durable walls on the said three sides of the reservoir in such a manner as to resist the force of the elements common to the locality and climate where they are situated, and to which they are liable to be subjected. I do not agree with the view maintained by the learned counsel for appellants, that the construction of the walls without regard to their permanency or durability, although it might answer the letter of the contract, would be sufficient to absolve the appellants from their obligations in the premises. The performance of the work specified in the contract was to effectuate an object. It was intended to secure to the town of Pendleton a system of water-works that would endure as long as improvements of that character usually continue. It was intended to have stability, and its establishment was contracted for

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with a view to that result. No performance of the work, therefore, not done in accordance with the spirit of the contract should be regarded as a compliance with its terms. Hence, the said walls, if built at all, were required to be constructed so as to be protected from frosts, as far as skill would enable it to be done, and have such a "backing" as would support them and prevent water during rainy seasons from getting behind them. And the obligation of the appellants to construct walls of that character and solidity is fairly inferable from the terms and conditions of the said contract.

The testimony, therefore, offered by the respondent, to show "what would have been a proper wall to have used in the reservoir to have held water, to stand a reasonable length of time, taking into consideration the weather and the frosts which were liable to occur; the wall to be constructed of the material and in the manner provided in the supplemental contract," and as to what effect frost would have upon the walls, was competent.

Nor do I agree with the view indicated by said counsel, that the respondent was required to comply strictly with its agreement to pump water into the reservoir as provided in said contract, in order to entitle it to recover in the action. I think that a substantial compliance by the respondent with the agreement was sufficient, if the appellants wholly failed to perform the contract on their part. The agreement was made to enable the appellants to test the reservoir in order to ascertain if it were "water-tight," and to give them an opportunity to repair any leakages which might be found in it. If, therefore, the respondent so far complied with its said agreement as to allow the appellants to accomplish that purpose, they could have no just grounds for complaint. It was immaterial whether the reservoir was filled with water one time or a dozen times in order to discover if it leaked or not. Whenever the water was pumped into it such fact could be readily ascertained. The appellants had the right under the second contract to draw the water off,—“to bleed the reservoir as

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often as they may deem it necessary for the repairing of the same,"—and any wilful neglect on the part of the respondent to fill it so that tests could be made for the purpose of ascertaining whether or not it needed repairing would have been a good defense to a recovery upon said contract. The appellants had the right to ascertain by a practical test, if they were ignorant of the fact, whether or not it was necessary to repair the reservoir in order to make it water-tight; but if, as the court charged the jury, they were afforded reasonable opportunities for ascertaining the fact, or if they had knowledge without making such test, that it would not hold water, they should not then be absolved from their undertaking.

The issues in this case were mainly issues of fact. The appellants maintained that it did not require the three walls of the reservoir to be walled up and plastered as specified in the supplemental contract in order to render it water-tight; they claim that they established that fact by the tests made, and also claim that the respondent had failed to give them the opportunity to make the tests and do the repairing of the reservoir, as it agreed to do in and by said contract. These were the questions to be determined in the case, and they were very proper ones to be submitted to a jury. The bill of exceptions shows that cogent proof was introduced on the part of the respondent tending to show that the reservoir was not water-tight and could not be made so without bestowing thereon the additional work, labor and expense referred to, also that the appellants had been given, in accordance with said contract, reasonable opportunity to make the test and do the necessary repairing, and that they had neglected to avail themselves of it. The jury found a verdict for the respondent, and unless they were misled by the rulings of the court to the prejudice of the appellants, the judgment appealed from should not be disturbed.

The appellants' counsel complain of many of the rulings of the court at the trial; of certain of the instructions given to the jury and of the refusal of the court to give

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those which they requested. I have examined these various rulings and conclude that there was no error committed in making them which would authorize a reversal of the judgment.

I entertain some doubt in regard to the correctness of the following instruction given by the court to the jury: "If you find that the supply-pipe of the reservoir did allow water to escape through its gates, and that such escape was due to the failure of the gates to shut by reason of gravel getting into the pipe, and if you further find that such gravel got into the pipe from the reservoir after the twenty-first day of June, 1887, and before the expiration of the ninety days, by reason of its imperfect construction and in its ordinary use, I instruct that such loss was within the scope of the undertaking of the contractors and they are to be held responsible therefor." "That filtration in the sense used in the instructions meant leakage from the reservoir from any cause owing to its defective construction and its incapacity by reason thereof to hold water." The escape of water through the supply-pipe of the reservoir, whatever may have been the cause, could not mean "filtration" as defined by the dictionary.

But the parties to the said contract certainly did not intend to use the word in the sense in which it is defined; they could not have meant by it the act or process of filtering. They undoubtedly intended it in the broadest sense which could be implied therefrom, viz., "passing through." They must have meant the escape of the water contrary to the design of the system, which could be obviated by the "walling up of the walls of the reservoir" and doing the plastering as specified, as no other view would be consistent with the obvious intention of the parties. The system of water-works put in by the contractors under the original contract with the city could only be operated by pumping water from a well near the river and forcing it through a receiving pipe, where it was held by means of gates in the pipe in order that it might be drawn off through the mains which supplied the town. The con-

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tract provided that the reservoir should be water-tight, hence the parties certainly intended that it should be constructed so as to enable the gates to be closed, otherwise it could not hold water. The supplemental contract was entered into merely for the purpose of carrying out the terms of the original one, consequently it was the duty of the appellants, if the reservoir had been so constructed as to prevent the gates from being used for the purpose for which they were designed, to repair it in that particular. They stipulated in effect that at the end of ninety days the reservoir should be virtually water-tight, if not they would make it so by the mode agreed upon.

The theory of the respondent's counsel at the trial of the case in the circuit court was that the action of the water upon the walls of the reservoir, owing to its imperfect construction, loosened and set in motion particles of gravel which found their way into the supply-pipe and prevented its gates from closing, thereby causing a waste of water through the same. In view of the testimony on the part of the respondent in support of this theory the said instruction was based, and I am of the opinion, after a due consideration of the two contracts, the nature of the subject matter thereof and circumstances connected therewith, that it was properly given.

The judgment appealed from will therefore be affirmed.

[Filed March 20, 1890.]

**MERCHANT'S NATIONAL BANK, RESPONDENT, v.
GEORGE POPE, APPELLANT.**

REPORT OF REFEREE—WHEN MAY BE SET ASIDE.—The provisions of the Code of this State, to the effect that the court may affirm or set aside the report of a referee in whole or in part, and may make another order of reference as to all or so much of the report as is set aside, to the original referees or others, or may find the facts and determine the law itself and give judgment accordingly; and that upon a motion to set aside the report, the conclusions thereof shall be deemed and considered as the verdict of a jury, only authorizes the court to set aside such report as to conclusions of fact, under the same circumstances in which it is authorized to set aside the verdict of a jury and grant a new trial, which it is authorized to do when the verdict is against the great weight of evidence.

19	85
c80	371
c80	373
19	35
134	557
19	85
40	888
19	85
43	314
19	35
48	479

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REFEREE'S REPORT—DUTY OF THE COURT WHEN SET ASIDE.—Where the court sets aside the report of a referee in whole or in part, and elects to find the facts and determine the law itself, it is its duty to find the facts and conclusions of law in the same manner as it is required to do when it tries a case without the intervention of a jury.

FACTOR—NO AUTHORITY TO PLEDGE GOODS CONSIGNED ONLY TO AMOUNT OF ADVANCES.—A factor or commission merchant, who receives goods to be sold upon commission, has no authority to pledge them; but where he has advanced money upon the goods, he thereby acquires a lien upon and special property in them to the amount of such advances, which he may pledge for his own use.

FACTOR—DRAFT AGAINST CONSIGNMENTS—INTEREST.—Where certain commission merchants received from time to time amounts of fish oil from a company engaged in the Alaska trade, upon the understanding and promise to make sale of it for the account of the company, and to render the proceeds thereof, less their charges for services in that behalf, and it was agreed between the merchants and the company that an account current of interest charges should be kept and paid at the rate of 10 per cent per annum, and the merchants, after receiving and shipping portions of the oil to a consignee in a foreign market for sale, upon which they had made advances to the company on account thereof, drew in their own name and for their own use against the consignments, and negotiated the drafts upon their own credit, but attached thereto the bills of lading as collateral security for the payment thereof; *held*, that interest upon the money received by the merchants in the negotiations of the drafts did not constitute a proper debit against them in their account with the company.

THE FINDING OF FACT MUST AUTHORIZE THE JUDGMENT.—*Held, further*, that the circuit court could not properly decide that interest upon said money, so drawn, was chargeable in the account against the said merchants, in the absence of a finding of fact justifying such decision.

APPEAL from a judgment of the circuit court for the county of Multnomah.

The respondent commenced an action against the appellant and one H. G. McDonald to recover an alleged balance of account between them and the Northwest Trading Company, claimed to have been assigned to the respondent.

It was alleged in the complaint that the said company was a private corporation; that the appellant and McDonald were partners in the mercantile business at Portland, Oregon, under the firm name of George Pope & Co.; that at divers times between the twelfth day of March, 1886, and the tenth day of March, 1889, the said Northwest Trading Company delivered to said firm from time to time large quantities of fish and oil of certain specified value, upon the undertaking and promise of the firm to make sale of the same for account of the said company and to render the proceeds thereof, less the charges of the firm for their services in the matter; that during said time the

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said firm sold said fish and oil for certain sums of money averred in the complaint and received the proceeds of the sale; that said company advanced to said firm a certain amount of cash, and said firm received also other sums of money to the use of said company from divers parties; that said firm rendered an account of sales of a large quantity of oil for account of said company, upon which they made an overcharge in their commission upon the sales thereof; that during said time interest accrued upon moneys received by the firm upon the sales of fish and oil consigned to them by said company, and not promptly paid over, to the amount of \$2,166.02; that an account of all the dealings was kept between said company and said firm, and divers payments to and charges against the company were made by the firm during said time, upon which there was due and owing from the firm the sum of \$7,740.56; that the company sold and transferred its claim therefor to the respondent with the knowledge and consent of the firm, and that the respondent had demanded payment thereof.

The said appellant filed an answer to the said complaint, in which he denied his partnership with the said McDonald after the fifteenth day of August, 1888; admitted that said company delivered to the firm a large quantity of fish and oil, and that the same was delivered upon an undertaking and promise to make sale of the same for account of the company, and to render the proceeds thereof, less the charges of the firm, for services in such behalf, to said company; but denied that any of the said fish or oil was delivered to said firm, subsequent to July 31, 1888; denied the delivery of the amounts of fish and oil, and of their value, at various times alleged in the complaint, and of the receipts of some of the amounts of money alleged therein; admitted that the said firm of George Pope & Co., on the tenth day of March, 1889, rendered an account of sales to the said Northwest Trading Company in which they made an overcharge of \$92.01, but denied that the firm made no return thereof; denied that any

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interest accrued upon moneys received by the firm upon sales of fish or oil consigned to them by said company and not promptly paid over; denied that an account of all dealings was ever kept between the said trading company and said firm, or that there was due or owing from the firm upon said account the sum of \$7,740.56 or any other sum, except the sum of \$1,894.90, which the said firm are ready to pay to whomsoever shall be entitled to receive it, and denied the assignment of the said claim to the respondent.

The appellant, for further defense, alleged that said firm of Pope & Co., between the twenty-fifth of March, 1886, and the twenty-eighth of February, 1889, made advances of cash and payments of cash on account of sales of oil, and paid, laid out and expended large sums of money for insurance, shipping and other expenses and charges in shipping oil for said trading company to London and elsewhere, and for rents, postage stamps, telegraph charges, etc., amounting in the aggregate to \$43,907.64; and that during the same period it was understood and agreed between the trading company and the said firm that an account current of interest charges should be kept and paid at the rate of ten *per cent per annum*; that during said period the balance of the interest account in favor of said firm and against said trading company amounted to \$2,601.38; that between the tenth day of May, 1886, and the twenty-ninth day of February, 1889, the firm received cash for the trading company from proceeds of consignments and from sale of fish, including interest on drafts as charged in Liverpool, amounting in the aggregate to \$47,903.92.

An exhibit was attached to the answer and made a part of it, known as "Exhibit A," which the appellant alleged in the answer contained a correct account of the said transactions between the parties.

It was also alleged in the answer that on September 1, 1886, the said H. C. McDonald was and for a long time prior thereto had been the secretary of the said trading company; that on the first day of September, 1886, the

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said firm shipped to Liverpool six hundred and sixty-two barrels of oil, delivered by the said trading company to them for sale on commission; that said firm, after so shipping said oil, drew upon their consignee and agent for the amount of \$5,936.92; that said draft was negotiated at Portland, Oregon, for said amount, and was placed to the credit of said firm at the Bank of British Columbia, where it was negotiated; that on the same day the said McDonald, then secretary of the trading company, drew a check in the name of said firm in his own favor for said amount, and as such secretary received said sum of money, and thereafter deposited it in another bank to his own credit, and drew checks against it as secretary of the trading company in payment of various claims against said company, which had full knowledge that the money belonged to said firm, and that the same was used and expended by said secretary in and about the business of the trading company, whereby said company became indebted to said firm in said sum, with interest thereon at said rate from September 1, 1886.

The respondent filed a reply to the new matter set forth in the answer denying the allegations therein contained regarding the amount and value of the oil delivered by the trading company to the said firm, also the amount of money alleged therein to have been received by the firm from the sales of oil and fish; denied that the firm gave credit to the company for moneys received except as alleged in the complaint; denied that there was due or owing from the firm, on account of the matters mentioned in the complaint and answer, the sum of \$1,394.90 only, or any sum other than said \$7,740.56; denied that the advances made by the firm for the trading company amounted to \$43,907.64, or any greater sum than \$32,414.34; admitted that during said period it was understood by and between the said trading company and said firm that an account current of interest charges should be kept and paid at the rate of 10 *per cent per annum*, but denied that the balance of the interest account in favor of the firm against the

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company amounted to the sum of \$2,601.38, or any greater sum than \$649.63; denied that said "Exhibit A" was a true or correct statement of account between the company and firm, but averred that a true statement of the account was contained in an exhibit attached to the reply marked "Exhibit B"; denied the allegation in the answer that McDonald received the said \$5,936.92 and deposited it and drew checks against it in payment of claims against the trading company, or that the company had knowledge or notice that it was the money or property of said firm; and also all other allegations relating to that matter.

After the issues were so formed, the court referred the case to three referees to find and report the facts and conclusions of law. The said referees, after having heard the testimony and proofs, made and filed their report wherein they found the facts put in issue by the pleadings, and as conclusions of law thereon found that the respondent was entitled to a judgment against the appellant for the sum of \$1,394.90.

Upon the filing of the said report, the said appellant moved the court that judgment be entered upon the report of the referees and for judgment in his favor for costs and disbursements; and the respondent at the same time filed exceptions thereto, and a motion to set aside the said report.

Said motions and exceptions were heard by the said court, which by its decision thereafter found and decided that the report and finding of the referees were erroneous, in the following particulars: That in the said statement marked "Exhibit A" the trading company was wrongfully charged with the items for commissions upon sales of oil, under date of August 15, 1888, \$10.65, \$8.37, \$160.44, and \$10.08,—in all the sum of \$189.54, and interest thereon amounting to \$25.76; that in said "Exhibit A" the trading company was not given credit for the sum of \$42.08 on account of fish sold, as found by the referees in their report, but for the sum of \$21.25 only, while it appeared from the evidence submitted in said cause that the said firm

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prior to the commencement of the action, had sold for account of said trading company fish to the amount of \$64; that the trading company was entitled to credits for interest at the rate of ten *per cent per annum* upon certain drafts drawn by the said firm against consignments of oil made to them by said company, over and above the credits for interest allowed in said "Exhibit A," amounting to \$1,886.22, and that as against said allowance of interest there should be charged as a proper incident of the expense account for the selling said oil, the interest charged and reserved by the consignee of said oil in Liverpool, England, amounting to \$551.71; that the evidence did not support the conclusions reached by the referees; that the proceeds of the draft for \$5,936.92 were received by said McDonald as secretary of the said trading company, but the court regarding the evidence sufficient to support the findings, that said moneys were applied by McDonald for the benefit of said company, confirmed it; that in said respects the findings of fact of the referees be modified, but in all other particulars they be approved and confirmed. In accordance with which said decision, it was ordered and adjudged that the respondent recover from the appellant, in addition to said \$1,894.90, the additional sum of \$1,607.31, with interest thereon from the commencement of the action, amounting in all to the sum of \$3,195.99, together with costs and disbursements. From the part of the judgment making the additional allowance by the said circuit court, the appeal herein was taken.

Charles H. Carey, for Appellant.

L. B. Cox, for Respondent.

THAYER, C. J., delivered the opinion of the court.

The counsel for the appellant contends that a circuit court cannot properly interfere with the findings of a referee regarding any fact as to which there is a conflict of evidence, and insists that there was evidence in this case tending to prove that the said firm of Geo. Pope & Co.

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was to receive five *per cent* commissions on all shipments and sales of oil and fish, and that the said circuit court should have left undisturbed the finding of fact by the referees upon that question. He also contends that there was no evidence authorizing said circuit court to allow to the trading company credits for interest upon the certain drafts drawn by the said firm against consignments of oil shipped by the firm for said company.

The statute, section 229, Civil Code, provides as follows: "The court may affirm or set aside the report" (referring to the report of the referee before whom a trial of the issues in an action has been had) "either in whole or in part. If it affirm the report, it shall give judgment accordingly. If the report be set aside either in whole or in part, the court may make another order of reference, as to all or so much of the report as is set aside, to the original referees or others, or it may find the facts and determine the law itself and give judgment accordingly. Upon a motion to set aside a report, the conclusions thereof shall be deemed and considered as the verdict of a jury."

The language of this section of the Code is too plain to be mistaken. It authorizes the court to set aside the report of a referee under the same circumstances in which it is authorized to set aside the verdict of a jury and grant a new trial, which it may do when the verdict is against the great weight of evidence. And in case it does set aside the report, in whole or in part, it is the duty of the court to make another order of reference, as to all or so much of the report as is set aside, to the original referees, or to others, or it may find the facts and determine the law itself and give judgment accordingly. If the court adopt the latter course, it is its duty to find the facts and conclusions of law in the same manner it is required to do when it tries a case where a jury trial has been waived. The court did not pursue that mode in this case, but I do not think the error is of such a nature as would authorize a reversal of its decision, as it evidently did not prejudice the rights of the appellant. It, however, would have been

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the better practice to have pursued the course indicated, and cases may arise in which it would be highly important that it should be done.

I have examined the evidence as to the amount of commissions which the said firm was to receive upon the shipment and sales of the oil and fish, and am of the opinion that the circuit court very properly made the reduction in the amount found to be due by the referees. The only testimony upon that point seems to have been that given by McDonald, and he testified that he made the arrangements himself on behalf of the firm to sell the oil at five *per cent* commission, two and a half of which was to go to R. D. Welch and two and a half to be retained by the firm. This arrangement covered the first shipments up to a certain date; that afterwards he made arrangement with Mr. Lowenberg to the effect that the trading company should pay seven and a half *per cent* commissions, five *per cent* of which was to be retained by the said firm of Pope & Co. The referees allowed five *per cent* commissions on all oil sold, and the circuit court only made the reduction in accordance with the arrangement as testified to by said witness.

It is claimed that McDonald, in making out a statement of the accounts between the trading company and the firm, charged the five *per cent* commissions on all the sales, but this was hardly sufficient to impeach his testimony regarding the arrangement made with Lowenberg, nor does the testimony of Pope contradict that of McDonald's in regard to the said arrangement.

The finding of the court that the trading company should have credit for the sum of \$43.08 on account of fish sold by the firm of Geo. Pope & Co. instead of \$21.25, as found by the referees, involves so slight a difference that the counsel for the appellant expressed at the hearing a willingness to waive any point regarding it. The decision of the circuit court, however, that the trading company was entitled to credits for interest upon the certain drafts referred to, does not seem to be supported by allegations, finding or proof.

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It could not have been claimed by the respondent in the complaint, as the balance of the entire accounts between the company and the firm claimed by it was only \$7,740.56, which evidently did not include a credit of \$5,936.92, the proceeds of the draft for that sum drawn by the firm against certain consignments of oil. That the firm should have credit for the amount of said draft was the main contention between the parties to the action; and the referees found that issue in favor of the appellant, which finding the circuit court substantially confirmed. By giving the firm that credit, the claim of the respondent only amounted to \$1,603.64, the difference between the \$7,740.56 and the \$5,936.92, which was subject to a further reduction for interest charged in favor of the trading company upon the money drawn. The appellant admitted in the answer an indebtedness of the firm to the trading company of the sum of \$1,394.90, to which should have been added the \$189.54, the overcharge for commissions upon the shipment and sales of the oil.

The real difference, therefore, in the accounts between the parties as claimed by them in the pleadings, after being adjusted in the respects above mentioned, was very small. The circuit court, however, increased it several hundred dollars by deciding that the trading company was entitled to credits for interest upon the drafts referred to. This allowance apparently was on account of a matter which was not legally in controversy between the parties, as it did not in fact constitute any issue in the case. There was no evidence concerning it, except that Pope & Co., after making shipments of the oil, and after having made advances to the trading company on account thereof, drew against the consignments and negotiated the drafts so drawn at the city of Portland. They did this in eight instances, but did it upon their own account and by pledging their own credit. It is true that they attached the bills of lading to the drafts negotiated, which became collateral security in the hands of the holders of the drafts. They were entitled to do that, and I cannot see that it gave

Points decided.

the trading company any right to claim interest on the money so obtained. Pope & Co. had no authority to pledge the oil for the payment of the drafts, but they had a lien upon it constituting a special property interest, to the amount of the advances made by them to the trading company, which they had a right to pledge for their own use. *Colebrooke on Collateral Securities*, §§ 407, 408.

The decision of the circuit court allowing interest on said draft must, therefore, be reversed, and the judgment rendered by said court be so modified that the respondent recover of the appellant the said sum of \$1,394.90, found due by the referees, the further sum of \$189.54, the rebate upon the commissions as charged by the firm of Pope & Co., with \$25.76 interest on said last-mentioned sum, also \$42.75, the price of the fish sold by said firm in excess of the amount found by the said referees,—amounting in all to the sum of \$1,652.95, together with interest thereon at the rate of ten *per cent per annum* from the time of the commencement of the action.

The case will, therefore, be remanded to the said circuit court with directions to enter judgment as herein provided, with costs and disbursements, in favor of the party legally entitled to recover the same. Each party to pay their own costs and disbursements incurred in this court, and neither will be entitled to recover costs or disbursements from the adverse party.

[Filed March 24, 1890.]

D. E. BUSH, RESPONDENT, v. CITY OF PORTLAND,
APPELLANT.

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MUNICIPAL CORPORATION—SURFACE WATER—WHEN NOT LIABLE FOR CHANGING ITS COURSE.—A municipal corporation is not liable to an owner of land situated within its corporate limits for not permitting surface water which had been accustomed to flow over the land to be turned down the gutters of one of its streets in order to prevent its flowing in its former course, although the improvement of the street obstructed its flow in the direction in which it naturally ran.

IMPROVEMENT OF STREET—WATER TURNED INTO A GUTTER.—Where the city of P. improved one of its streets running north and south, and thereby turned surface water which had been accustomed to run down a slope on the west side thereof

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across the same and a certain other piece of land to where it emptied into a creek which ran across the land, and the improvement of the street turned the water down the gutter on the west side of the street where the city authorities first designed it to run permanently, but it being subsequently ascertained that the course of the water down the gutter was injuring the street and abutting lots below, the said authorities turned it across the street and by means of a box gutter conveyed it through said land to the said creek near where it formerly ran, and B. thereafter, having purchased the land, diverted its course down the gutter on the east side of the street where it ran until complaint was made by the abutting lot owners on that side of the street, when the city authorities turned it back again into the said box gutter, and the evidence failed to show that the street was not properly improved, or that conveying the water through the box gutter was more injurious to the land than it would have been if allowed to flow in its natural channel course; *held*, that B. was not entitled to recover damages against the city in consequence of the turning of the water from the gutter of the street into the box gutter.

IMPROVEMENT OF STREET—INJURY OCCASIONED BY.—A municipal corporation is not liable to an owner of real property for an indirect injury to the property, occasioned by the improvement of its streets, where the injury is a necessary consequence of the improvement, and the work is properly performed.

APPEAL from a judgment of the circuit court for the county of Multnomah.

The respondent commenced an action in said court against the appellant, a municipal corporation, for the recovery of damages. He alleges in his complaint that he was the legal owner and in possession of a certain tract of land situate in the corporate limits of the city of Portland; that on or about the sixteenth day of December, 1888, the said appellant, by its agents, officers and employes, wrongfully and unlawfully cut the gutters on Fifteenth street and caused large quantities of surface water to flow over and across the said land, whereby the soil thereof was being washed off, to his damage, etc.

The appellant filed an answer to the complaint, denying that it, by its agents, officers or employes, or otherwise, did the act therein complained of. And for a further defense averred that in the year 1888 the respondent wrongfully and unlawfully constructed an open gutter or drain in Fifteenth street and caused the said surface water referred to in the complaint, which was then flowing, and had for many years prior thereto been flowing over and across said lands, to flow down the same, which being insufficient to convey the water, caused great dam-

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age and injury to the property holders living along the line of said street; that thereupon the officers of the city cut said gutter or drain so constructed, by respondent and caused said surface water to flow over and upon said land, the same being a street and highway, to wit, Mill street; that said cutting of said drain was done to prevent damages to owners of property on said Fifteenth street, and was the same cutting complained of in the complaint.

The respondent filed a reply denying the new matter set up in the answer. The case was tried by jury, who returned a verdict in favor of the respondent and against the appellant for the sum of \$50, upon which the judgment appealed from was entered.

W. H. Adams, for Appellant.

C. M. Idleman, for Respondent.

THAYER, C. J., delivered the opinion of the court.

It appears from the bill of exceptions herein that about the year 1884 the city of Portland caused Fifteenth street to be improved in front and west of the land described in the complaint, and caused a stream of water, which ran a considerable quantity in winter time but was dry during the summer, to run down the open gutter on the west side of said street. Said gutter, however, overflowed as soon as the winter rains came and washed out a large amount of earth, thereby damaging the street and property below. That thereupon parties supposed to be in the employ of the city constructed a box gutter across said street and across the land in question to the bed of a larger creek which flowed through said lands from the south. Said land at that time was owned by one A. Mier who continued to own it until the year 1888. Mier made no objection to the water being turned upon the land, and it was running across the same in the box gutters at the time of its purchase by the respondent. As soon as the latter purchased the land he constructed, without any permit from the city authorities, an open gutter down the east side of said

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Fifteenth street and turned the water into the same. Soon thereafter complaint was made to the superintendent of streets of the city by property owners on said street about the water running down the street where respondent had turned it, and he ordered it turned back; and parties came and sawed his open gutter in two and turned the water back on respondent's land, where it was when he constructed the gutter. It also appears from the bill of exceptions that the creek, which flowed across respondent's land from the south, was a continuous stream, having quite a wide channel and emptied into what is known as "Tanner's creek"; that the said surface water, before the said improvement of Fifteenth street was made by the city, flowed across the land within a few feet of the place where it was made to flow by the construction of the box gutter, and that it spread out over more ground, as it formerly ran, than it did after it was confined. Nor was there any evidence tending to show that the running of the water affected the land more injuriously by being confined in a box sewer than it did when allowed to run at large, although said Mier testified that he considered the box gutters a damage to the property; nor was there any evidence of damage to the land by the flowing of the water across it, except that a witness for the respondent was allowed by the court to be asked what it would cost to take care of the water turned upon the land, to which he answered that it would take \$60 or \$70 to take care of it. This testimony, however, was taken under an objection interposed by appellant's counsel, and an exception was taken to the ruling of the court thereon. There was also evidence tending to show that the gutters along the sides of said Fifteenth street were allowed to become clogged with mud and gravel, and that if kept clean would convey away all the water.

After the respondent rested his case, counsel for appellant moved for a non-suit on the ground that the water in question was surface water and the city was not liable for its flowing on respondent's land in any event, and that the

appellant had not been shown to be connected with the turning of the water upon the land and no damages were proven to have been sustained by respondent. The court overruled the motion and the appellant's counsel excepted to the ruling.

It is quite evident that the improvement of Fifteenth street by the city necessarily interfered with the natural flow of the surface water which ran from the west side of the street eastward over the land in question to the creek, which ran through the land from the south. The street ran north and south, and when graded, the water was turned northward down the gutter on the west side of it. The city authorities intended in the outset to use that gutter as a means of conveying away the water which came down from the west, but it was soon ascertained that it would be impracticable to do so, as it affected the street, and lot owners, below, seriously. They then resorted to the method of running the water across the street at the most convenient point; and from thence, by means of the box sewer, through the respondent's land to the said creek at or near the place where it had formerly flowed. The respondent, after purchasing the land from Mier, conceived the idea of turning the water down the east side gutter of the street and thereby prevent its running across his land, which he proceeded to do. The result was that it affected the lot owners below on that side of the street and caused complaint to be made to the city authorities, who thereupon turned it back again through the box gutter. Upon what ground the respondent, in view of the facts, could predicate a right of action against the city, is very difficult to discover. The city had an undoubted right to improve the street, and unless it was guilty of negligence in the execution of the work, the respondent had no legal cause for complaint. Parties owning property within the corporate limits of a city are necessarily compelled to submit to many inconveniences which the grading and improvement of streets occasion. Building

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up a city is liable to incommode the owners of land situated within it in certain respects, but they are amply compensated therefor by the enhanced value of the property and by numerous benefits they indirectly receive in return. The owners cannot be deprived of the property, nor of its permanent enjoyment without just compensation, but they may be compelled to use it in conformity with general regulations established to promote the welfare of the community.

The learned circuit judge who presided at the trial of the case instructed the jury that they were to decide from the evidence whether the water in question was surface water or a well-defined stream, and if they found that it was a well-defined stream with a marked channel,—then, if the appellant had diverted it from its natural channel and caused it to flow in a channel not substantially the same as that in which it naturally flowed, and the respondent had sustained damages thereby, the appellant was liable for such damages, and their verdict should be for the respondent in the amount to which he had been damaged thereby. This instruction was not authorized by the pleadings or evidence in the case. The water was described in both complaint and answer as surface water which flowed during the rainy season, and there was no evidence that the respondent was damaged in consequence of its course being diverted from that in which it had been accustomed to run. There was not, in fact, any evidence that there had been a material diversion of its course; confining it in a box gutter rendered it less liable to do damages to the respondent's land than if it were allowed to spread over the land.

Municipal corporations have been held liable for damages resulting to private property where in the improving of their streets they have interfered with the flow of a natural stream of water; but the evidence in this case does not show that the water in question constituted a natural stream, nor was it so claimed by the respondent's counsel at the hearing.

Points decided.

The judgment appealed from must therefore be reversed, and the case remanded to the circuit court with directions to dismiss the complaint.

[Filed March 21, 1890.]

LOUISA HYLAND, RESPONDENT, v. BENJAMIN
HYLAND AND AMOS D. HYLAND,
APPELLANTS.

EQUITY—PLEADING—WHAT COMPLAINT MUST CONTAIN IN A SUIT TO REFORM WRITTEN INSTRUMENT.—A complaint in a suit to reform a written instrument in consequence of a mistake in its execution, must allege facts; it must show what the parties to the instrument mutually agreed to do, and wherein the writing fails to express their agreement, and that the mistake did not occur through any carelessness or negligence of the plaintiff; otherwise a demurrer to the complaint should be sustained.

COMPLAINT—DEFECTIVE STATEMENT OF A CAUSE OF SUIT—WHAT IS.—Where the plaintiff, a married woman, in a suit against her husband as defendant to have reformed a certain deed executed by him to her, alleged in her complaint that for a valuable consideration the defendant bargained and sold to her certain real property, that he promised and agreed with her that he would execute and deliver a deed conveying to her the said property during her natural life, and then to her heirs and assigns forever, and that the defendant executed and delivered to the plaintiff a deed of conveyance to the property, but by mutual mistake the words "and then to her heirs and assigns forever" were omitted from the deed; that the defendant instructed and directed the person who wrote the deed to insert the said words, but he inadvertently and through mistake omitted to write in the same; that the plaintiff relied upon the word of the defendant, and, being ignorant of business of that kind, did not read the deed nor find out the mistake until a short time before bringing the suit; *held*, that the complaint was faulty in not stating the terms of the agreement between the parties which the deed was given to effectuate, but that the fault only constituted a defective statement of cause of suit, and not a defective cause of suit; and that therefore the defendant waived the defect by filing an answer to the complaint.

PLEADING—ANSWER—BONA FIDE PURCHASER.—In order to defeat an outstanding equity in real property by a plea that the defendant was the purchaser of the property in good faith, he must set forth in his answer the deed of purchase, the date, parties and contents briefly; that the vendor was seized in fee, and in possession; he must state the consideration, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed; and he must deny notice previous to and down to the time of paying the money and delivery of the deed. And where it was averred in the answer of a defendant in such a case, that at or about a certain date his grantor executed and delivered to him a deed of conveyance, conveying unto him the title to the property, and that he did on such date, without knowledge or notice of such equity, purchase the property in good faith and for a valuable consideration, and was absolute owner of it in fee simple; *held*, that it was insufficient to give the defendant the benefit of the claim that he was an innocent purchaser of the property without notice. *Held, further*, that evidence showing that the deed was made out in favor of the defendant without his knowledge, but immediately afterwards delivered to him, and after receiving it he

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Statement of facts.

promised and agreed that he would take care of the grantor his life-time in consideration of the property, and that he received knowledge of the equity about the time the deed was delivered, or soon afterwards, and the suit to enforce the equity was commenced within the next three months thereafter, did not prove that the defendant was an innocent purchaser of the property.

APPEAL from Lane county: R. S. BEAN, judge.

The respondent commenced suit in said court against the appellant to reform a deed to certain real property situated in said county. She alleged in her complaint that on the twenty-seventh day of November, 1885, the appellant Benjamin Hyland, for a valuable consideration, paid him by the respondent, bargained and sold to the respondent the said real property consisting of 170 acres of land; that said appellant promised and agreed with her to execute a deed conveying to her said land during her natural life, and the remainder to her heirs and assigns forever; that on or about said time said appellant executed and delivered to her a deed of conveyance to said land, but the following words, to wit, "and then to her heirs and assigns forever," were by mutual mistake omitted from the deed; and that at the time said deed was executed, said appellant, in the presence of respondent, instructed and directed the person who wrote the deed and took the acknowledgment thereof to insert therein the words, to the said respondent, "during her natural life, and then to her heirs and assigns forever," but the officer or justice of the peace who wrote the deed failed through mistake to write in the said words.

The respondent alleged that she relied upon the word of the said appellant, and being ignorant of that kind of business, did not read said deed, and that the said omission and mistake were not noticed or found out by her and said appellant until a short time before; that the said appellant put her into the possession of the said premises, and that she had been in the absolute possession of the same since the execution of the said deed; that immediately after finding out the said mistake in said deed, she applied to said appellant to correct it, but that he refused and still refuses to do so.

Statement of facts.

The respondent further alleged that on or about the — day of 1887, the said appellant Benjamin Hyland, without any valuable consideration, made, executed and delivered a pretended deed of conveyance to said premises to the appellant Amos D. Hyland which was without a valuable consideration and was fraudulent. The said complaint contained a prayer for relief that the said Benjamin Hyland be decreed to correct the said deed by adding and inserting therein the said words, and that the said deed to said Amos D. Hyland be declared void and of no effect, and be set aside; and for such other and further relief as might seem equitable and just.

The appellant Benjamin Hyland filed an answer to the said complaint denying the agreement to convey the land as therein alleged; denying that the said words “and then to her heirs and assigns forever” were omitted from the deed through mistake; denying that he instructed or directed the person who wrote the deed to insert the said words therein; denying that said person inadvertently or through mistake omitted or failed to write the said words therein, or that said respondent relied upon the words of said appellant, or that being ignorant of business of the kind, she did not read said deed; and denied all the material allegations in the complaint. Said appellant also denied that the deed made by him to Amos D. Hyland was made without any valuable consideration; and alleged that he made, executed and delivered said last-mentioned deed in good faith.

The said appellant Amos D. Hyland also filed an answer to the said complaint denying all the material allegations therein contained; and for further and separate answer to the said complaint alleged that the deed made to him by the said Benjamin Hyland was for a valuable consideration, and that he, without any knowledge or notice of any mistake or omission in said deed to said respondent, and without any knowledge or notice of any fraudulent intent of said Benjamin Hyland, or knowledge or notice of any fraud rendering void the title of said Benjamin Hyland to

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said premises, purchased the same in good faith and for a valuable consideration, and was the absolute owner in fee simple thereof subject only to the life estate of said respondent.

The said respondent filed replies to the new matter contained in said respective answers denying the same. The case was referred to referee to take and report the testimony therein, and the same was thereafter heard by the court upon the report of the said referee, which found that the equities were with the respondent, and that she was entitled to the relief demanded in her complaint. Upon which finding the decree appealed from was entered.

J. J. Walton, for Respondent.

A. E. Gallagher, for Appellants.

THAYER, C. J., delivered the opinion of the court.

It appears from the evidence taken by the referee in this case that at the time of the execution of the deed by the appellant Benjamin Hyland to the respondent, the said parties were husband and wife, and had been such for nearly twenty years; that they had a family of children the fruits of their marriage; that the said appellant had had a former wife who had borne him several children, among whom was the appellant Amos D. Hyland, and that at the time of the execution of the deed by the said Benjamin Hyland to the said Amos D. Hyland, which was so executed November 10, 1887, a suit for a divorce was pending in said circuit court between said respondent and said Benjamin Hyland. It further appears from the evidence that the consideration for the deed from Benjamin Hyland to the respondent was a conveyance by the latter to the former of certain real property owned by her situated in the city of Corvallis, Benton county. The respondent, in order to sustain her allegation in the complaint that the words "then to her heirs and assigns forever" were omitted through mistake in the said deed from the said Benjamin Hyland to her, relied upon her own

testimony, and that of several other witnesses, who testified that the said Benjamin Hyland, soon after the execution of the deed, stated on a number of occasions that he had conveyed the property in question to the respondent for life, and then to her heirs and assigns. I think the evidence upon that point, in the absence of any conflicting testimony, was sufficient to establish the fact alleged. The deed itself shows upon its face that the said Benjamin Hyland intended to convey his entire interest in the said property; otherwise he would not have been likely to have inserted the covenants therein, whereby he covenanted to and with the said respondent, *her heirs and assigns*, that he was the owner in fee simple of said premises, that they were free from all incumbrances, and that he would warrant and defend the same from all lawful claims whatsoever. The appellant's counsel at the hearing did not seem to claim that the evidence was insufficient to prove the fact that such mistake was made in the execution of said deed to respondent; and the evidence on the part of the respondent upon the point was more convincing as it was not controverted by the appellant Benjamin Hyland, who was evidently well acquainted with all the facts connected with the affair. Said counsel, however, did rely upon the allegations in the answer that the appellant Amos D. Hyland purchased the property in question from Benjamin Hyland in good faith and without notice of any such mistake having been made, and upon the insufficiency of the respondent's complaint in the suit. Said counsel, in claiming that Amos D. Hyland was a purchaser in good faith without notice, is confronted with a difficulty in regard to the sufficiency of his answer upon that point. A defendant who interposes a plea or answer of that character must state therein, as was said by Baldwin, J., in *Boone v. Childs*, 35 U. S. R. p. 211: "The deed of purchase, the date, parties and contents briefly, that the vendor was seized in fee, and in possession; the consideration must be stated with a distinct averment that it was *bona fide* and truly paid, independently of the

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recital in the deed. Notice must be denied previous to, and down to, the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all the circumstances referred to, from which notice can be inferred; and the answer or plea shows how the grantor acquired title. * * * Such is the case which must be stated, to give a defendant the benefit of an answer or plea of an innocent purchaser without notice; the case stated must be made out; evidence will not be permitted to be given of any other matter not set out."

Said answer materially fails to contain the several requirements above specified, and the evidence comes far short of proving that said appellant Amos. D. Hyland was such innocent purchaser of the property. He testified in the suit, in answer to the interrogatory to state when and under what circumstances and where he purchased the 170 acres of land, as follows: "On the tenth day of November, 1887, at the court-house; I went to find father's attorney to have him make a deed to my brother, B. S. Hyland, and have him, if the attorney thought best, to take care of him his life-time. When I came back to the court-house father had made the deed to me and said he would rather stay with me. I agreed to take care of him his life-time for the land."

In answer to another interrogatory, to state what the facts were about the deed being made, executed and delivered to him without any value or valuable consideration, he answered:

"The deed was made to me before I knew it. When I found it out we made an agreement that I was to take care of him his life-time for the land. I accepted of the deed with that understanding, which I have done to the best of my ability."

This substantially is all the evidence given by said appellant in regard to the affair and of the consideration paid or agreed to be paid by him for the land. He testified that he had no knowledge prior to his coming to Eugene

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City upon that occasion of any deed having been executed by Benjamin Hyland to the respondent, nor of the alleged mistake; but the circumstances under which the deed was made and delivered to him were calculated to cast suspicion upon the *bona fides* of the transaction. He knew that a suit for a divorce had been commenced by the respondent against Benjamin Hyland, which was then pending, and that it would necessarily affect any title the latter had in the property. He received the deed to the land more as a gift than as a purchase, and was at the time evidently contriving with Benjamin Hyland a mode by which the latter could divest himself of his apparent title to the remainder in the land. He made no advancement as a consideration for the deed, nor any agreement as an inducement to its execution, though he testified that he promised when the deed was delivered to him that he would take care of his father during the latter's life-time for the land. Whether that would have been an adequate consideration for the property does not appear. It would be absurd, however, to hold that the transaction constituted said Amos D. Hyland a purchaser in good faith, and contrary to the uniform decisions of this court upon that question. *Musgrove v. Bonsor*, 5 Or. 313; *Richards v. Snyder & Crews*, 11 Or. 501; *Wood v. Rayburn*, 18 Or. 3.

The main ground upon which the appellant's counsel appeared to rely at the hearing was the alleged insufficiency of the respondent's complaint to entitle her to a decree of reformation of the said deed; and I think it altogether the strongest point in his case. Attorneys who prepare complaints to reform written instruments are too apt to state conclusions instead of facts. They should set out the transaction as it occurred and not the legal effect thereof. The complaint in this case should have stated what the parties mutually agreed to do in regard to the exchange of their lands, and not the result of what they did do.

If the terms of the original agreement between the parties to the transaction involved herein and their attempt

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to effectuate it had been set out, the court could have readily discovered from the facts, if truly stated, whether or not there was such a mistake as alleged and in what particular it consisted. Instead of doing that, however, the respondent's counsel contented himself by alleging the promise and agreement made by Benjamin Hyland to make, execute and deliver to the respondent a deed conveying to her said premises during her natural life, and then to her heirs and assigns forever, and that he executed and delivered to her a deed of conveyance to said premises, but said words "and then to her heirs and assigns forever" were by mutual mistake omitted therefrom. Such a mode of alleging a cause of suit is highly objectionable; the statement is too general, and if the case had come here upon demurrer to the pleading I should have been in favor of sustaining the demurrer. The objection, however, is made at hearing in this court, and it seems to me that under such circumstances every reasonable inference should be given in favor of the complaint that can be drawn therefrom. It is not a case of a defective cause of suit, but of a defective statement of cause of suit. If the complaint had lacked some material allegation, the defect would be fatal and could be taken advantage of without interposing a demurrer; but where the defect consists in alleging evidence of facts, or conclusions of facts instead of the facts themselves, it will be waived unless a demurrer is taken to the pleading. The fault of the complaint in this case is of the latter character.

The decree appealed from will therefore be affirmed.

Per Curiam.

[Filed March 31, 1890.]

J. W. RAYBURN, RESPONDENT, v. L. L. HURD, JAMES
A. CAUTHORN ET AL., APPELLANTS.

COSTS—WHEN PLAINTIFF ENTITLED AND WHEN NOT.—In an action upon a contract to recover money or damages, the plaintiff is not entitled under the Code of Civil Procedure to costs and disbursements unless he recover \$50 or more; except it be an action involving an open mutual account, and the sum total of the accounts of both parties exceed \$150. Where in an action upon a note to recover an amount due thereon exceeding the sum of \$50, the defendants by pleading a counter-claim reduced the amount of the recovery to a less sum than \$50; *held*, that the plaintiff was not entitled to recover costs and disbursements in the action. *Held, further*, that the decision of this court in *Roberts v. Carland*, 1 Or. 333, construing the former statute of the Territory of Oregon in regard to the allowance of costs and disbursements, had not been followed by the courts of the State in the construction of the provisions of the Code upon the subject, and could not be without doing violence to the language of the legislature.

APPEAL from Benton county: R. S. BEAN, judge.

The respondent commenced an action against the appellants in the county court of Benton county to recover upon a certain note for the payment of money, executed by appellants to one J. C. Young for the sum of \$350 and assigned to respondent.

The appellants filed an answer in the action in which they set up counter-claims against the note arising out of matters of indebtedness alleged to be due them from Young at the time of his assigning the note to respondent amounting to \$360.94.

The case was tried in the county court and judgment recovered therein in favor of the respondent, from which judgment the appellants took an appeal to the said circuit court, where the action was tried by jury, who returned a verdict for the respondent for \$20.06, upon which a judgment was entered in his favor, and costs and disbursements allowed him by the court, from which allowance of costs and disbursements the appeal herein was taken.

J. R. Bryson and W. S. McFadden, for Appellants.

J. W. Rayburn in person.

PER CURIAM.—The respondent contends that as his claim amounted to \$350 and was reduced by offsets to the

Per Curiam.

amount recovered, he was entitled to costs and disbursements, although he failed to recover \$50, and he cites *Roberts v. Carland*, 1 Or. 333, in support of his contention. Subdivision 3 of section 549, Civil Code, provides when a plaintiff shall be entitled to recover costs and disbursements in an action for the recovery of money when the amount of the recovery is less than \$50, to wit: "In an action involving an open mutual account, when it appears to the satisfaction of the court that the sum total of such accounts of both parties exceeds \$150."

In all other actions for the recovery of money or damages, the plaintiff is not entitled to recover costs and disbursements unless he recover \$50 or more; except in actions for assault, battery, and like cases, he is entitled to recover as much costs and disbursements as damages, where the recovery is less than \$50; and in an action to recover the possession of personal property, where he recovers property or the value thereof, and damages for its detention, in all less than \$50, he is entitled to recover costs and disbursements equal to the sum of such value and damages. Sub. 5, § 549, Code. In this case the respondent was not entitled to recover costs and disbursements under any of the provisions of the Code. Such was the effect of the decision of this court in *Lockwood v. Hansen*, 16 Or. 102. The decision in *Roberts v. Carland*, *supra*, was made under the former Territorial statute, the provisions of which were similar in many respects, in regard to the allowance of costs and disbursements, to those of the Code, yet it has never been followed by the State courts, and cannot be without doing violence to the language of the legislature upon the subject.

The decision of the circuit court appealed from will, therefore, be reversed and the case remanded to that court with directions to allow costs and disbursements in favor of the appellants.

Opinion of the Court—Strahan, J.

[Filed March 31, 1890.]

**J. D. FORBES, RESPONDENT, v. THE WILLAMETTE
FALLS ELECTRIC CO., APPELLANT.**19 61
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LIEN FOR LABOR ON STRUCTURE—ELECTRIC WIRE.—Poles set in the ground connected together by wire in the usual way for the transmission of electricity for the purpose of light and power, constitute a structure within the meaning of section 3669, Hill's Code, and a lien attaches for labor performed on such structure under employment by the contractor.

EVIDENCE—TIME CHECKS.—Time checks given by the contractor to the laborer, though not conclusive against the owner of the structure, are declarations of the defendant's agent in the line of his employment, and are to be considered and weighed for whatever they are worth; and if their effect be not countervailed in some way, may be sufficient proof of such claim.

ATTORNEY'S FEES—WHAT AMOUNT REASONABLE.—The statute allows the court to tax an attorney fee in favor of the plaintiff in case of the foreclosure of a lien. *Held*, that when fifteen liens were foreclosed in one suit, ten dollars for each claim was not unreasonable.

LIEN—INTEREST.—On the subject of interest in such case, *The Willamette Falls T. & M. Co. v. Riley*, 1 Or. 183, approved and followed.

APPEAL from Multnomah county: L. B. STEARNS, judge.

This is a suit to enforce a number of liens for labor. It is alleged one Stronach had a contract with the defendant corporation to dig holes and place the poles therein and stretch the necessary wires on the same from, at or near the city of Portland to a point at or near Oregon City. The said wires were to be used by the defendant corporation for the purpose of transmitting light and power from the company's works at the falls of the Willamette river to the city of Portland and for other electrical purposes.

The plaintiff, as well as the others whose claims were assigned to him, rest their claim to enforce this lien on the fact that Stronach had a contract with the defendant corporation to do the work which they performed, and that he employed each of said parties, at a fixed rate of wages per day, to assist in its performance.

J. C. Moreland, for Appellant.

C. D. Young, for Respondent.

STRAHAN, J., delivered the opinion of the court.

The plaintiff's right to the remedy which he seeks must depend on the statute. Section 3669, Hill's Code, provides:

Opinion of the Court—Strahan, J.

“Every mechanic, artisan, machinist, builder, contractor, lumber merchant, *laborer*, and other person performing labor upon or furnishing material of any kind to be used in the construction, alteration, or repair, either in whole or part, of any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, or aqueduct, or any other *structure* or superstructure, shall have a lien upon the same for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building or other improvement or his agent, and every contractor, sub-contractor, architect, builder, or other person having charge of the construction, alteration, or repair, in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner for the purposes of this act.”

The principal question litigated on this appeal is whether or not this statute gives a lien for labor against the property described in the complaint; in other words, do these poles, planted in the ground, connected together by wires and insulators, constitute a *structure*, within the true intent and meaning of this statute? In answering this question, but little aid can be had from the decisions of other States; for the reason that no general principle of law is involved, and such decisions have generally turned upon the special or peculiar phraseology of the particular statute. Without attempting to indulge in any refined distinctions or definitions, and having in view the object and purpose of the enactment in question, I think it may properly be held that the poles, wires, insulators, etc., mentioned in the complaint, constitute a *structure* within the meaning of the statute, and that the same is subject to a lien for labor performed thereon.

In reaching this conclusion, we do not find it necessary to go as far as the court did in *Helm v. Chapman*, 66 Cal. 291, where it was held that a mine or pit sunk within a mining claim was a *structure* within the meaning of the statute, giving a lien on a building, improvement or *structure*.

Opinion of the Court—Strahan, J.

2. Some question was made as to the insufficiency of the evidence to establish some three or four of these claims; but I think the objection cannot be sustained. It is shown that Stronach had a contract with the defendant corporation to do the work; that these men each worked on the job under the directions of Stronach or his foreman, and received time checks showing the amount due each; that they filed proper notices of lien, and in most cases the exact number of days and the amount agreed to be paid is fully proven.

The defendant offered no evidence, and what was offered by the plaintiff does not seem to be discredited in any way. Stronach's time checks are not conclusive against the defendant, but they are declarations of the defendant's agent in the line of his employment, and are to be considered for what they are worth. Any dishonesty or bad faith on his part in the transaction would greatly impair their credit and weaken their force; but we perceive nothing of that kind in this case.

3. The statute allows the court to tax an attorney's fee in favor of the claimant in case of the foreclosure of liens under the act, and in this case the court allowed a fee of ten dollars for each claim. We do not think this an unreasonable sum.

4. The respondent claims interest on each claim, from the date of the filing of notice. There seems to be no valid objection to this claim, and it will be allowed.

It was said by this court in *Willamette Falls T. & M. Co. v. Riley*, 1 Or. 183, that claims for which mechanics may have liens are certainly as much entitled to draw interest after they become due as any other; and we cannot think that for the recovery of such interest it would be necessary to bring a separate suit, or take a separate judgment, but conclude that interest may be computed on lienable demand, and a lien awarded for the entire amount.

The decree will therefore be modified so as to allow lawful interest on each demand from the date of filing notice of the lien, and in all other respects the decree is affirmed.

Opinion of the Court—Lord, J.

[Filed April 2, 1890.]

**T. A. MCBRIDE, EXECUTOR, RESPONDENT, v. NORTHERN
PACIFIC R. R. Co., APPELLANT.**

DEATH AFTER JUDGMENT—EFFECT OF ON RIGHT OF APPEAL.—A suit is suspended during the period between the death and the order granting a continuance, and this period is not to be deemed any part of the time limited for taking an appeal.

RAILROAD CROSSING—DUTY OF TRAVELER TO LOOK AND LISTEN.—It is the duty of a traveler to look and listen before attempting to cross a railroad track, and especially at a crossing known to him to be dangerous from its obstructed view and the conformation of its surroundings rendering it difficult to hear.

EVIDENCE—PRESUMPTION, WHERE THE RECORD IS SILENT.—Where there is no direct evidence that a traveler did not stop, look and listen before he entered upon the crossing, the presumption of law is that he did his full duty and observed the precautions which it prescribed.

RAILROAD CROSSING—MUTUAL DUTIES.—While it is the duty of travelers when about to cross a railroad track to exercise proper care and caution by using their sense of sight and hearing, it is likewise the duty of those to whom is committed the control and supervision of the movements of the train to exercise such care and caution at such crossings, and to give the warning signals so as to prevent injury to those traveling on the highway.

REFUSAL OF NEW TRIAL—NOT APPEALABLE ERROR.—The granting or refusing of a motion for a new trial rests wholly in the discretion of the court and cannot be reviewed upon appeal.

APPEAL from Columbia county: F. J. TAYLOR, judge.

LORD, J., delivered the opinion of the court.

This was an action brought by Mariam Benham, as administratrix of her husband, John L. Benham, deceased, against the defendant company for negligently causing the death of plaintiff's intestate by running over him with a locomotive while he was crossing the defendant's railroad at a public crossing.

The answer denied the negligence alleged, and set up that the injury of which complaint is made was caused by the contributory negligence of the plaintiff.

The reply denied the new matter, and issue being then joined, a trial was had, which resulted in a verdict and judgment for the plaintiff on the eighteenth day of May, 1888. A preliminary question is raised by the defendant on a motion to dismiss the appeal, on the ground that the appeal was not brought within the six months limited to take an appeal.

The facts upon which this motion is predicated are these:

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Opinion of the Court—Lord, J.

On the second day of July, 1888, the original plaintiff, Mariam Benham, sole representative of John L. Benham, died, leaving a will, in which the present plaintiff, T. A. McBride, was named as executor, and on the thirteenth day of July, 1888, the will was admitted to probate, and letters testamentary were issued to him. On the tenth day of October, 1888, the second day of the term of the circuit court for Columbia county, next following the judgment, the defendant moved the court that T. A. McBride, executor as aforesaid, be substituted as plaintiff in the action, showing, in an affidavit in support of the motion, the death of Mariam Benham and the appointment of the said T. A. McBride as her executor, and stating the reason for which the substitution was asked to be to enable the defendant to perfect its appeal from the judgment in this action, which was resisted by the executor McBride and denied by the court. At the ensuing term of that court in 1889 the executor McBride moved for his own substitution, upon the ground alleged in his affidavit, to enable him to issue execution to enforce the payment of said judgment. The order of substitution was granted on the fourteenth day of May, 1889, and in a few days thereafter notice of appeal from said judgment was served upon him, and he now moves as plaintiff to dismiss the appeal for the reason that the record discloses that the appeal was not taken within the six months prescribed by law.

The Code prescribes in the case of the death of a party that the court may at any time, within one year thereafter, on motion, allow the action to be continued by or against personal representatives, or successors in interest. Hill's Code, § 38.

The death of a sole plaintiff suspends the right to execution, and the suit is suspended during the period between the death and the order allowing the continuance of the suit, and that period is not to be deemed any part of the time limited for taking an appeal. *Dick v. Kendall*, 6 Or. 166.

The counsel for the plaintiff admits that the decision in this case is in the teeth of his contention, and must be

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overruled to sustain his position, but the facts, as disclosed by this record, so strongly serve to show and recommend the equity and justice of that decision that we have no disposition to overturn or overrule it until better advised.

To return to the error assigned, the record discloses that in the progress of the trial, when the plaintiff had rested, the counsel for the defendant moved for a judgment of non-suit upon the ground that the testimony for the plaintiff failed to prove a cause sufficient to be submitted to the jury, and this constitutes the first assignment of error. The question, then, which we are called upon to decide is, whether the facts submitted in evidence by the plaintiff were insufficient to warrant a verdict. Where there is no evidence for the plaintiff, or such a defect in it as the law will not permit a verdict to be given to him, it is the duty of the court to grant a judgment of non-suit. But in deciding this question it is to be kept in mind that the evidence for the plaintiff stands admitted and undisputed, and concedes every fair inference which may be drawn from it, and that the defendant, conceding this, claims that it is so defective or insufficient in law to prove the cause of action alleged as not to authorize its submission to a jury or to warrant a verdict. The defect or insufficiency of the evidence consists, not so much in a want of evidence as that the evidence for the plaintiff, which established negligence of the defendant, also proved negligence on the part of the decedent contributing to that result.

The testimony for the plaintiff shows that the intestate was a careful and thrifty farmer who resided in the vicinity of the crossing where the injury and his death occurred and was familiar with its location and surroundings; that he was run over by the locomotive while crossing the railroad with his team at its intersection with the county road and found dead a few moments thereafter, and that no one was with him at the time of the accident. It further shows that about a half a mile above the point where the acci-

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dent occurred the railroad track runs through a cut at the foot of a bluff, while the county road runs along parallel to the track and some two hundred yards distant from it on the top of the bluff; that as the county road nears the crossing it approaches somewhat closer to the track, and when about one hundred yards from the crossing it makes a turn toward the track and approaches it at right angles, but the view of the track is obstructed until very near it, that the track makes a bend near the crossing, about two hundred feet above it so that the smoke stack of the locomotive can only be seen about that distance; that the county road comes down a declivity until it reaches the track and crosses the grade; that a man traveling with his team along the county road on the bluff would not be likely to hear a train on the track below, unless it sounded the whistle, although the opinion is expressed, if the team was standing still and there was no noise from the wagon that a train might be heard; but even this was dependent on how the wind was blowing. The testimony further shows that the whistle was not sounded, but it does not disclose whether the bell was rung or not; that the train was running at a high rate of speed when it approached the crossing and the accident happened. The conclusion to be drawn from these facts may be thus summarized: that the decedent was a man of ordinary faculties and of prudent habits; that he was acquainted with the railroad crossing and its surroundings; that the crossing was more than ordinarily dangerous—a blind crossing—where the surroundings indicate that it is difficult to see and difficult to hear an approaching train, and where the road to the crossing is declivous, rendering it somewhat unsafe to leave a team, when alone, and difficult to ascertain the approach of a train unless the proper signals are given; that at such a crossing and under such circumstances the locomotive with the train approached the crossing at a high rate of speed, without giving any warning or sounding the usual signals, and run over and killed the decedent while in the act of crossing.

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A railroad crossing is a place of danger, and one crossing it must use his sense of sight and hearing if he would avoid injury. In view of this recognized fact, there is a multitude of decisions which hold that it is the duty of a traveler, whether on foot or with a team, when approaching a railroad crossing, to look and listen before attempting to cross the track, and that if he neglects to do so, and is injured, he is contributorily negligent and cannot recover.

It was the duty of the decedent before attempting to cross the track of the defendant to use his faculties, and to look and listen if any train was approaching, and more especially at a crossing known to him to be dangerous from its obstructed view and the conformation of its surroundings, rendering it difficult to hear, particularly with a team, and if he failed or neglected to perform this duty which the law devolved upon him, his injury or death was caused by his own negligence and he cannot recover. But whether the decedent stopped and looked and listened before he attempted to make the railroad crossing, or what he did on that occasion, the evidence for the plaintiff does not disclose, nor is it incumbent on him to show that he did stop, look and listen, before attempting to cross, to enable him to recover. Where there is no direct evidence that a traveler did not stop, look and listen, the presumption of law is that he performed his full duty, or that he was not contributorily negligent. "The common law presumption is," said Clark, J., "that every one does his duty until the contrary is proved, and in the absence of all evidence upon the subject, the presumption is that the decedent observed the precautions which the law prescribed."

In the case at bar, no witness was called who saw the occurrence. There is no evidence whatever whether the decedent in fact did stop and look and listen. The presumption is that he did; proof of that fact was no part of the plaintiff's case. The presumption is of fact, merely, and may be rebutted, but we are without evidence on the subject;

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all that we have is that as he came upon the railroad he was struck down by the locomotive. *Schum v. Railroad Co.*, 107 Penn. St. 12.

To the argument, then, so ably presented, that, as there was evidence for the plaintiff tending to show that an approaching train might be heard, if the wagon was making no noise and standing still, so that the decedent, if he had stopped his team and listened, he could have heard the approaching train in time to have avoided the injury and escaped his death, the answer is that the law presumes that he did stop and listen and observe the precautions which it prescribes.

While it is the duty of a traveler on the road, when about crossing a railroad track, to observe the proper care and diligence by looking and listening, or both, as the necessity of the situation may require, for his safety, yet where the evidence is silent as to what the party injured in fact did on the occasion, it is not to be presumed that he recklessly exposed his own life, or attempted to cross the track in the face of an approaching train. Besides this, the testimony shows, according to one witness, that "it was not very easy to hear the train unless it whistles when it is down in the cut and you are on top of the road." "That it may be heard if the wagon is making no noise, but cannot be heard so well as when it whistles;" and another thinks the ability to hear in such case "depends on how the wind blows"—all tending to show, in view of the difficulty both of seeing and hearing, and the declivous nature of the highway to the railroad crossing, that a traveler might be liable to get in a position of peril from which he could not extricate himself before he could see or hear the train unless warned by the usual signals. What relative position he and his team occupied to the train, or the circumstances under which he acted, we cannot know, and at best can only conjecture upon the facts presented by this motion on record.

Advancing toward the crossing down a declivity on a highway upon which he could only see the top of the

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smoke-stack of the locomotive from ten to twenty yards from the crossing, and moreover, upon a highway where it was difficult to hear when the train was in the cut unless a warning signal was given, listening, as was his duty, we may suppose, and hearing no train himself nor any warning signal of its approach, he may have continued to advance upon the assumption that no train was near or approaching, and have entered upon the crossing before he saw the train, or reached a point in his passage where he could neither advance nor recede without danger.

In cases of this character, the facts are not explainable only on the theory of negligence as held even in those jurisdictions where contributory negligence will be presumed when there are no obstructions to the sight or hearing. *Tolman v. Railroad Co.*, 98 N. Y. 198.¹

While it is the duty of travelers when about to cross a railroad track to exercise proper care and caution by using their senses of sight and hearing, it is likewise the duty of those to whom is committed the control and supervision of the movements of the train to exercise such care and caution at such crossing, and to give the warning signals before reaching it, so as to prevent injury to those traveling upon the highway.

"Where the surrounding circumstances," says one text writer, "render the crossing specially dangerous to travelers on the highway, as where the line is curved, or there are obstructions to the view, it is the duty of the railway to take precautions commensurate with the danger." And again: "It is a duty incumbent on the railway to cause its trains to approach and pass the crossing with care and such a rate of speed of the train as, under the conditions of the crossing, is prudent with regard to travelers on the highway. Ry. Ac. Law, §§ 170, 171.

In view of the mutual right of the parties to use this crossing, and the duty of care and caution that devolved on each under the circumstances, we are of the opinion, upon the evidence submitted for the plaintiff, taken, as it

(1) 55 Am. Rep. 649.

Points decided.

must be, as true, that there was no error in overruling the motion for non-suit.

The next error specified is that the court erred in overruling the defendant's motion for a new trial. The motion was based on the ground that the evidence was insufficient to sustain the verdict. As the record discloses that no exceptions were taken, we must assume that no error of law occurred during the trial, or in the charge of the court, or that the court refused to give any direction asked, which the defendant desired to have certified to us. The case, then, at this stage rests solely on the error assigned in overruling the motion for a new trial.

It has been frequently held by this court that the granting or the refusal of such a motion rests wholly in the discretion of the trial court, and cannot be reviewed on appeal. *State of Oregon v. Fitzhugh*, 2 Or. 236; *Halleck v. City of Portland*, 8 Or. 29; *Kearney v. Snodgrass*, 12 Or. 311; *State v. Mackey*, 12 Or. 156; *State v. Clements*, 15 Or. 243, in which THAYER, C. J., said: "The court has nothing to do with the rulings of the lower court upon the motion for a new trial, or to set aside the verdict of a jury. It deals only with questions of law, and they must be squarely presented as such."

It results that we cannot do otherwise than affirm the judgment.

[Filed April 5, 1890.]

DANIEL DURBIN, APPELLANTS, v. KUNEY & SAYERS,
RESPONDENT.

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19	71
37	63

RIGHT OF CONTRIBUTION—AFFECTS WHAT PARTIES.—The right of contribution affects only the relation of the co-debtors or sureties between themselves, and is entirely distinct from and independent of the contract with the creditor. The contract is made for the benefit of the creditor and simply expresses the relation between the co-debtors and the creditors.

12.—HOW IT ARISES.—The right of contribution does not spring from contract, but rests on general principles of natural justice, that when one has discharged a debt or obligation which was a common charge for the benefit of all, he has a right to call upon his co-debtors for contribution.

13.—IT EXISTS WHETHER THE PARTIES ARE JOINTLY OR SEVERALLY LIABLE.—Nor does it matter in regard to the right of contribution whether the parties are jointly

Statement of facts.

or severally liable, nor whether they are bound by the same or separate instruments, or whether they knew of each other's engagements or not, nor whether they are liable in the same or different amounts, provided their obligation be assumed in respect to one and the same transaction.

1A.—WHERE IT ARISES.—The right of contribution arises only when one has paid more than his proportion of the debt, and that is the time when the statute of limitations begins to run.

APPEAL from Marion county: R. P. BOISE, judge.

This action was brought against the defendants for contribution. The facts are in substance these: On the fifteenth day of August, 1879, the plaintiff Durbin and the defendants Kuney & Sayers, parties to this action, gave two promissory notes of that date to R. M. Wade & Co., each for \$162.50, due in three and fifteen months after date, respectively, and signed by all the parties, in payment for a harvester purchased by them, and that the plaintiff Durbin paid off both notes as follows: On September 24, 1881, he paid R. M. Wade & Co. \$203.63—the amount then due on the three months' note; on May 20, 1883, he paid R. M. Wade & Co. \$80; September 6, 1886, \$59.15; November 3, 1887, \$116.10, which constitute the various sums paid on the other note and judgment which was rendered against the parties.

As one cause of defense, the defendant Sayers pleads that the note paid off on September 24, 1881, by the plaintiff Durbin is barred by the statute of limitations. A motion was made to strike out this defense, which was overruled by the court, and on the trial of the cause the court gave the following instructions, to which exceptions were taken: "If plaintiff has paid off and taken up one of the notes in the complaint, more than six years before the commencement of this action, he cannot recover in this action any of the money so paid on that note, because a cause of action accrued at the time of such payment and expired by the statute of limitations before commencement of this action. That if the statute of limitations has run against one note, that note is out of this case; and that the utmost that the plaintiff can recover in that event would be one-half of the money paid on the other note."

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S. T. Richardson & M. W. Hunt, for Plaintiff.

Geo. H. Burnett, for Defendant.

LORD, J., delivered the opinion of the court.

The facts disclose that the notes were founded upon one transaction and were given for one debt, but the instruction treats the right of the plaintiff to recover contribution as dependent on the contract, expressed by the notes and subject to the statute of limitations according to the order of their payment. The right of contribution affects only the relations of the joint debtors or sureties between themselves, and is entirely distinct from and independent of the contract with the creditor and cannot be varied by an act of his. The contract is made for the creditor, and for his benefit, and is intended simply to express the relation between the joint debtors or sureties and the creditor. It depends more upon a principle of equity than upon contract; the fundamental principle being that whenever persons are in *equati jure* a common liability is a common charge. The justice of the rule is manifest.

It rests upon the broad principle of justice that when one has discharged a debt or obligation which was a common charge for the benefit of all, he has a right to call upon his co-debtors for contribution. Originally it was enforceable only in courts of equity, but in later days courts of law have assumed jurisdiction on the ground of an implied promise on the part of each joint debtor or surety to contribute his share to make up the loss. 4 Am. and En. Ency. of Law p. 1, *et seq.* The remedy in equity in many respects is superior, being more extensive and more effectual in its operation than a court of law. But the theory of an implied contract upon which courts of law assumed jurisdiction, Denio, J., thought "assumed for the purpose of enforcing the equitable principle of contribution and not upon the idea that any such contract actually exists." *Barry v. Ramson*, 14 N. Y. 466; so that in a case where contribution on principles of natural justice ought to be enforced, the right to it exists in equity

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and law. For as Baron Eyre says: "If we take a view of the cases, both in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice and does not spring from contract; though contract may qualify it." *During v. Earl of Winchelsea*, 2 Bos. & Pul. 270. "And this general principle of justice is," says Judge Story, "as all are equally bound and are equally released, it seems but just in such a case all should contribute in proportion toward a benefit obtained by all, since no one ought to profit by another's loss where he, himself, has incurred a like responsibility." Story Eq. Jur., § 493. And he says also that "it matters not in case of a debt whether the sureties are jointly bound or only severally, or whether their suretyship arises under the same obligation or instruments, if all the instruments are for the same identical debt. *Id.* § 495.

In *Norton v. Coons*, 3 Denio, 132, Bronson, C. J., said: "The doctrine of contribution among sureties is founded on general principles of equity and justice. Sureties are in *equati jure* and must bear the burden equally. Contribution may be enforced whether they were bound jointly or severally; by the same or by different instruments; and although the party who sues did not know at the time he became a surety that the defendant was also a surety. The order of time in which they became bound is not a material inquiry. The only question is, whether they were in fact sureties for a principal debtor and in relation to one and the same transaction. Courts of law have borrowed their jurisdiction on this subject from courts of equity, and along with it they have taken the maxim that equality is equity." So that it may be said in regard to the right of contribution that it does not matter whether the parties are jointly and severally bound, or only severally, nor whether they are bound by the same or separate instruments, or whether they knew of each other's engagements or not, nor whether they are liable in the same or different amounts, provided their obligation be assumed in respect to one and the same transaction. *Chaffee v. Jones*, 19 Pick. 260; *Aspenwall v.*

Sache, 57 N. Y. 331; *Armstrong v. Pulver*, 87 N. Y. 494; *Warner v. Morrison*, 8 Allen, 568.

It is clear, then, that the doctrine of contribution does not depend upon contract, but is bottomed and founded on principles of natural justice. The contract upon which they are co-debtors, or sureties, only expresses the relation between them and their creditor, and is entirely distinct from the right of contribution, which exists between themselves. The notes were made to R. M. Wade & Co. and expressed the relation between them as joint debtors and creditors, but they were made for the benefit of the creditor, and represented but one debt. The right of contribution to the co-debtor paying more than his share does not rest upon the notes, but on the broad principles of justice, that when he discharged the debt for which they were equally bound with him to discharge, and removed thereby a common burden, it is but just that they should refund to him a ratable proportion. The facts concede that it was agreed between the plaintiff Durbin and his co-debtor, the defendants, that he was to pay one-half of the debt, and as between them his payment has reference to it, and not to the contract or notes, and his right to contribution arises as soon as he pays more than his share of such debt. "The right of action for contribution accrues when one has paid more than his proportion of their liability. It is an equity which arises when the relation of co-sureties is entered into and upon which a cause of action accrues when one has paid more than his proportion of the debt for which they were bound." *Camp v. Bostwick*, 20 Ohio St. 337; *Bonham v. Galloway*, 13 Ill. 68; *Ponder v. Carter*, 12 Ired. 242, and when the plaintiff paid more than his proportion of the debt a cause of action ripened, and that is the time when the statute of limitations begins to run. *Mills v. Hyde*, 19 Vt. 59; *Boardman v. Paige*, 11 N. H. 431.

According to the facts, at the time when the plaintiff paid the \$203.63 he only paid one-half of the whole debt, and it is indisputable, if the defendants had paid the other half, that the plaintiff would have no right of contribution

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and therefore he had not paid more than his proportion, and until then a right to contribution cannot arise. And as the statute of limitations does not begin to run until the plaintiff has paid more than his proportion of that debt, it did not begin to run when he paid the sum of \$203.63. His right of contribution is not measured by nor founded upon the notes, but on the payment of more than his proportion of the debt which the notes represented. He is not substituted to the place of the creditor, and seeking relief on that basis, for in that case the instruction might be correct, but his equity springs out of the debt as to which he and the defendants stand *equati jure* and must bear the burden equally.

We think, therefore, the instructions were erroneous statements of the law as applicable to the facts, and the judgment must be reversed and a new trial ordered.

[Filed April 7, 1890.]

JACOB B. SPAUR, APPELLANT, v. JOHN T. MCBEE,
RESPONDENT.

PRACTICE—STATUTE OF LIMITATIONS—DEMURRER.—Where it is apparent on the face of a complaint that the action was not commenced within the time limited by the Code under subdivision 7 of section 67, Hill's Code, the objection must be taken by demurrer, and under section 71, if not so taken, it is waived and cannot be taken by answer. Under that section it is only where the objection does not appear on the face of the complaint that the same is to be taken by answer. *Hill v. Cooper*, 6 Or. 182, approved and followed; and held further, that the amendment to section 332, Hill's Code, made in 1878, has not impaired the authority of said case or rendered the same inapplicable.

EQUITABLE DEFENSE OF EJECTMENT AT LAW.—A defendant sued in ejectment might under that amendment use his equitable title defensively in an action at law, but he could use it for no other purpose. A court of law under that provision cannot administer complete relief in favor of such equitable owner by decreeing specific performance when proper or necessary. In such case a judgment at law does not estop or preclude the party against whom it is rendered from demanding of the defendant, in a separate suit in equity brought for that purpose, a conveyance of the legal title, where the same was acquired by the defendant with notice of the plaintiff's equitable rights.

APPEAL from Douglas county: R. S. BEAN, judge.

This is a suit in equity to enjoin the enforcement of a judgment in an action of ejectment and to require the

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present defendant to convey to the plaintiff the real property in controversy. The defendant had a decree in his favor in the court below, from which this appeal is taken. The facts sufficiently appear in the opinion.

J. F. Watson, for Appellant.

J. W. Hamilton and *W. R. Willis*, for Respondent.

STRAHAN, J., delivered the opinion of the court.

By his complaint the plaintiff claims to be the equitable owner of the land in controversy and to have been in the actual and exclusive possession of the same ever since the year 1862. It appears that in the year 1862 one J. A. Velzain and Jesse Fry owned the land in controversy and that the same was a part of a larger tract owned by them; that the plaintiff also owned a large tract which adjoined the lands of Velzian and Fry; that a small parcel of the plaintiff's land laid on the west side of the South Umpqua river, consisting of about six acres, and that the parcel in controversy was separated from the other lands of Velzain and Fry by said river and was situated on the east side thereof, and consisted of about twenty-four acres and joined the plaintiff's other lands; that at this time the plaintiff and Velzian and Fry entered into an agreement to exchange their small parcels, one for the other; but inasmuch as the lands which plaintiff was to receive in exchange were regarded of greater value than the other, he was to pay the difference in hogs, which he did in the sum of seventy-five dollars, the difference in value agreed upon. At that time the plaintiff entered into possession of the twenty-four acre tract and caused it to be included in his enclosure, and every year thereafter, except two or three, he cultivated the same, and when the land was not in cultivation he used it in all respects like his other lands and sometimes using it for pasturage; that at the same time Velzain and Fry entered into possession of the six-acre tract and retained possession of the same. It also appears that Velzain and Fry conveyed their entire tract

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of land by deed to the defendant, including the twenty four acres which they had sold to the plaintiff; but at the time the defendant took said deed he had full notice of the plaintiff's rights in and to said twenty-four acres. In September, 1887, the defendant recovered a judgment against the plaintiff herein in the circuit court of Douglas county, Oregon, for the possession of said twenty-four acres, and is about to issue an execution to support the same. The defendant's answer denies the material allegations of the complaint, pleads the statute of limitations, and relies upon the judgment in ejectment as an *estoppel*.

1. A very decided preponderance of the evidence tends to support the plaintiff's allegations, and I think clearly entitles him to the relief which he seeks, unless his right thereto is defeated by something shown upon the part of the defendant; or unless there is some fatal defect or omission in his own statement of the case, and to those matters our attention will now be directed.

2. The first point presented by the answer of the defendant requiring notice is his plea of the statute of limitations. But if that objection really existed and was available at any stage of the suit, it was waived because not taken by demurrer. The facts are fully stated by the complaint, and if the plaintiff's equity was barred by the statute the objection was apparent on the face of the complaint. In such case the objection must be taken by demurrer or else it is waived. Section 67, Hill's Code, enumerates the grounds of demurrer to the complaint, and the seventh specification is "that the action has not been commenced within the time limited by this Code." And section 70 provides: "When any of the matters enumerated in section 67 *do not appear* on the face of the complaint, the objection may be taken by answer." Section 71 provides: "If no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action." This

section does not make it optional with a defendant to take the objection by demurrer or answer at his pleasure, but construed in connection with the preceding sections, it means that the defendant *must* demur where the objection appears on the face of the complaint; and when it does not so appear, the objection may be taken by answer, and where it is not taken by demurrer when that is the proper mode of raising the question, or by answer, where that is the proper mode, the same is waived and cannot be insisted upon at the trial. This construction of the sections of the Code referred to effectually eliminates the statute of limitations from the case and leaves it to rest entirely upon the other questions presented.

3. This leaves the question of estoppel to be considered. In *Hill v. Cooper*, 6 Or. 182, the precise question involved here came before this court for the first time for adjudication, and after a careful examination of the point, it was held that, under the statute which allowed an equitable defense by cross-bill in actions at law, a party might rely upon a legal defense in an action without being thereby precluded from afterwards asserting his equitable title in an original suit.

That is what this plaintiff is endeavoring to do by this suit after having suffered defeat in a trial in an action at law, and under the authority of *Hill v. Cooper*, *supra*, his *equities* were not concluded by the judgment. But counsel for the respondent contend that the jurisdiction of a court of law was so enlarged by the amendment to section 378, now section 382, of Hill's Code, in 1878, as to necessarily enlarge and extend the effect of a judgment at law in such case; and they claim in effect that *Hill v. Cooper*, *supra*, is no longer an authority under this statute for the principle therein announced. The amendment was in the form of a *proviso* to the original section, and added these words: "Provided, this section shall not be construed so as to bar an equitable owner in possession of real property from defending his possession by means of his equitable title; and in any action for the recovery of real property, or the

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possession thereof, by any person or persons claiming or holding the legal title to the same under such patent against any person or persons in possession of such real property under any equitable title, or having in equity the right to the possession thereof, as against the plaintiff in such action, such equitable right of possession may be pleaded by answer in such action, or set up by bill in equity to enjoin such [action] or execution upon any judgment rendered therein; and the right of such equitable owner to defend his possession in such action, or by bill for injunction, shall not be barred by lapse of time while an action for the possession of such real property is not by the provisions of title II. of chapter I. of this Code."

No doubt these provisions do greatly extend the jurisdiction of courts of law in such case; but such jurisdiction is not comprehensive enough to enable such court to act finally upon the rights set up by the plaintiff in this suit. A defendant sued in ejectment might use his equitable title defensively in an action at law, but he could use it for no other purpose.

That amendment of the Code did not confer upon a court of law jurisdiction over the entire equities of the defendant, and enable it to grant full and complete relief by decreeing specific performance when proper. Besides, under our practice, the machinery of a court of law is not adapted to work out such results. A court of law might, for some one of the reasons named in the section, refuse to turn a defendant out of possession, but it would be utterly powerless to clothe him with the legal title, which in this case the defendant holds as trustee for the plaintiff, or to adjust the equities which might grow out of the relations of the parties or be presented by the facts of the particular case. We must, therefore, hold in this case that the judgment at law did not estop or preclude the plaintiff from demanding of the defendant a conveyance of the legal title to the land in controversy which the defendant acquired with notice of the plaintiff's equities.

4. One other question remains to be considered. It

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was suggested on the argument here that the plaintiff has not shown himself entitled to the relief which he seeks for the reason he has not conveyed the six acres, and therefore he has not done equity. Fry has been a non-resident of the State for many years, and Velzain sets up no claim to the six acres, and it does not clearly appear that the defendant has succeeded to their rights in said land, but I think it may be inferred from all the circumstances attending the transactions that he did.

The record does not disclose what is the condition of the six acres at this time; but the decree appealed from will be reversed, and the plaintiff will have a decree for the relief which he seeks upon the conveyance by him to the defendant of said six acres, or in default of such conveyance the court below is directed to ascertain the value of said six acres at the time of the commencement of this suit; and the value so ascertained shall be decreed to be a charge upon the twenty-four acres herein directed to be conveyed in favor of the defendant, which may be enforced by execution, and that the enforcement of the judgment mentioned in the complaint be perpetually enjoined and restrained.

[Filed April 7, 1890.]

J. C. BUMP, RESPONDENT, v. J. S. COOPER, APPELLANT.

CONTRACT—CONSTRUCTION OF.—Where a contract fixed the price for the sale of a certain quantity of hops to be delivered in a good and merchantable condition, etc., but contained a further provision giving the benefit of the rise in the market to the seller, with the privilege of closing the sale within a time specified; *held*, that the provision was intended for the benefit of the seller, and if he failed to exercise the privilege and close the sale within the time limited, it became *functus officio*, and the time fixed by the contract became the price agreed to be paid.

CONTRACT—MEASURE OF DAMAGES.—In the event that the hops were not sound and merchantable, as contracted for, the measure of damages would be the difference between the value of the hops, as fixed by the contract price at the time and place of their sale and delivery, and their value with the defect complained of.

APPEAL from Benton county: R. S. BEAN, judge.

LORD, J., delivered the opinion of the court.

This was an action to recover money, founded upon a written contract. The contract, omitting immaterial parts,

XIX. OR.—4.

19	81
20	527
23*	806
26*	848

19	81
48	184

Opinion of the Court—Lord, J.

is as follows: That "the party of the first part (plaintiff Bump) does hereby agree to sell and doth sell and agree to deliver, or to cause to be delivered, to the party of the second part (defendant Cooper) all her crop of hops, the growth of the year 1888, the said hops to be of good first quality, well baled and put up in good merchantable order and condition, in bales of about one hundred and eighty-four pounds, etc.; said hops to be delivered in lots of not less than eight bales, at Independence, between this date and the first day of November, 1888, and in consideration thereof, the party of the second part agrees to pay the party of the first part, in full payment for said hops, the sum of twelve cents per pound after delivery to and acceptance by said party of the second part. It is further agreed that said E. C. Bump is to have the benefit of rise in market value, with privilege of closing the sale at market price until the fifteenth day of November, 1888." This is followed by an allegation, "that the rise in the market value over and above said twelve cents per pound mentioned in the contract, etc., was four cents additional up to said day of November, 1888," etc. After making certain denials, defendant set up affirmatively in substance that the plaintiff failed to furnish and deliver good first quality baled hops, put up in good merchantable order or condition, etc.; that plaintiff represented said hops to be of good first quality and in a merchantable condition, etc., and that said representations and warranty were untrue, and that by reason of said damaged condition of said hops, etc., the same were worth no more than four cents per pound at Independence, etc.

The reply denied specifically each and every allegation set up in the defendant's separate defense.

Upon trial the jury found a verdict for the plaintiff upon which the court rendered a judgment, from which the plaintiff has appealed to this court. The first question is, as to the construction of the contract. Under the contract, the price of the hops, if they were properly baled and delivered in a good and merchantable condition, was fixed

Opinion of the Court—Lord, J.

at twelve cents a pound, unless the plaintiff exercised the privilege of closing the sale for any rise in the market, which should occur within the time limited. The provision is, that the plaintiff "is to have the benefit of the rise in the market value with the privilege of closing the sale at market price until the fifteenth day of November, 1888." This provision was inserted for the benefit of the plaintiff, and if she neglected to avail herself of it, and close the sale, when the rise in hops should happen, within the time prescribed, it became *functus officio*, and the price fixed by the contract at twelve cents became the price agreed to be paid. It is a privilege which she must exercise or act upon by closing the sale, and which she forfeits by failing or refusing to avail herself of it before the expiration of the time specified. If the hop market, instead of rising, should decline, the plaintiff would have no occasion to exercise the privilege and would be entitled to the price fixed in the contract. On the other hand, if there was a rise in the hop market, and she failed to act upon it and close the sale at such increased price, within the time allowed, the privilege was gone, and the price fixed by the contract prevailed. Under the allegation in the complaint, the plaintiff was permitted to prove the rise in the market value of hops to be four cents additional over the price fixed in the contract, or sixteen cents a pound, up to the time specified, without alleging that the privilege was exercised and the sale closed at the increased market price within that time. The plaintiff could not do this unless it was alleged that the sale was closed, under the provision, by an exercise of the privilege it granted; for otherwise the price was fixed by the contract and the defendant was not liable beyond it. To permit such testimony was not only misleading, but it was unauthorized, for it permitted the jury, as they did do, to find a verdict for a price and an amount not warranted by the contract, unless the plaintiff availed herself of the privilege and closed a sale with the defendant within the time limited, and the fact was so alleged.

Opinion of the Court—Lord, J.

The bill of exceptions discloses that the defendant Cooper was called and sworn as a witness in his own behalf, and gave evidence tending to show that the hops delivered to him by the plaintiff were worthless, and that there was no market for said hops at Independence; that he tried repeatedly to sell them, but that he could not find a buyer on account of their not being merchantable, and in a damaged condition.

On cross-examination he was asked the following question: "Did you sell the hops afterwards, and after the sixteenth day of November, 1888, and if so, when and for how much?" To which question objection was made and overruled by the court, and the witness then, among other things, proceeded to testify, that "in February, 1889, he shipped the remainder of said hops to Cincinnati, Ohio, and sold the same;—a part for twelve cents a pound net at Independence, and the remainder for fourteen cents a pound net at Independence, about one-half for twelve cents, and about one-half for fourteen cents."

The objection to this testimony is that the plaintiff was bound to make good his contract at the time and place agreed on, and that he cannot discharge that obligation by inquiring into the sale, three months afterwards, or at another place. Under the pleadings as the case stands, the defendant was treated as the owner of the hops after delivery under the contract; and if the hops were of the quality, properly bailed in the condition bargained for, the defendant was liable for the amount fixed by the contract, unless the defendant should be able to make his defense good, and show that they were either worthless or not merchantable, or in a damaged condition. In that event the measure of damages would be the difference between the value of the hops, as fixed by the contract price at the time and place of their sale and delivery, considered as sound, and their value, with the defect complained of. What this value was, if the hops were in a damaged condition but had a marketable value, had reference to that time and in that market, or the nearest mar-

Points decided.

ket. What the defendant might sell such hops for several months, or as to that, years afterwards, was a matter of his own concern, and the price he would receive would depend on the scarcity of the article or condition of the market, and might be greater or less, and in no event could affect the issue involved. As the case must go back, it is not necessary to be more particular as to this matter, as the theory upon which the action was tried was inconsistent with the terms of the contract.

The judgment must be reversed and a new trial ordered.

[Filed April 7, 1890.]

W. D. PUGH, RESPONDENT, v. GEORGE E. GOOD,
APPELLANT.

DISBURSEMENTS—WITNESS FEES ALLOWED.—When the pleadings present a material fact, the party having the *onus* of proof may subpoena witnesses to support the issue on his part, and if such witnesses are not sworn because the adverse party at the trial admits the fact, thus rendering evidence unnecessary, such party, if he recover cost, may tax the fees of such witnesses as disbursements and recover the same off of the adverse party.

WITNESSES NOT SWORN—WHEN CHARGES FOR NOT TAXABLE AS A DISBURSEMENT, AND WHEN TAXABLE.—If a witness attend upon the trial of a cause and is not sworn, the party causing him to be present cannot recover from the adverse party the expense incurred for such witness unless some sufficient reason exists which would legally excuse his failure to testify. It must be made to appear that his attendance was necessary at the time, but that by reason of some unforeseen event, or other sufficient cause, his testimony became unnecessary.

ISSUES—WITNESSES—COLLATERAL QUESTIONS.—A party is bound to assume that the only issues triable in a cause are made by the pleadings, and if he subpoena witnesses to testify to matters outside of such issues, he does so at his peril. In cases where collateral inquiries are permissible, a party may bring witnesses to testify in relation to the same, but before he can properly charge as disbursements the expense incurred in procuring the same, he must show that the attendance of such witnesses was necessary. *Jackson v. Sigfus*, 10 Or. 28, approved and followed.

FEES OF OFFICERS—MUST BE AUTHORIZED BY STATUTE.—An officer can make no charge for any act performed by him by virtue of his office, unless the legislature has, by some statute, authorized such charge.

SERVICES BY SHERIFF—WHEN CONSTABLE AUTHORIZED TO ACT.—By the terms of section 2940, Hill's Code, if services be rendered by a sheriff in cases where a constable is authorized to act,—in a justice court, for instance,—he must charge the fees allowed by law to a constable for the performance of that particular service, and no more.

SOME ITEMS FOR WHICH THE STATUTE HAS PROVIDED NO COMPENSATION IN JUSTICE'S COURT.—The law has not specifically provided compensation in a justice's court for the following services, but the compensation provided covers and includes these items: Making copy of summons; certificate and return; making copy of subpoena; certificate and return on same; making copy of notice of appeal; return on same. Nor is a sheriff allowed, as a separate item, ten cents for making his return on subpoena in the circuit court.

19	85
28	383
19	85
30	439
19	85
40	212
19	85
46	34

Opinion of the Court—Strahan, J.

This is an appeal from the taxation of costs. The action was originally commenced in the justice's court for Salem precinct to recover \$100 for work and labor alleged to have been done on the brick building situate at the north-west corner of State and Commercial streets, in the city of Salem, Oregon, now occupied by Gibson & Singleton as a drug store, and for making drawings and specifications therefor, and overseeing and superintending the work thereon, and for altering front of said brick building and fitting up same for a drug store,—all of which was furnished, rendered and performed to and for said defendant by said plaintiff's special instance and request, and all of the same was and is of the value of \$100; and that said defendant promised and agreed to pay plaintiff said sum therefor. Then follows a statement that the amount is due and unpaid, etc. The answer was a denial.

The plaintiff had judgment in the justice's court for the amount claimed, from which an appeal was taken with the like result. The plaintiff then filed his bill for costs and disbursements of both courts, which amounted to \$80.65. The defendant objected to various items thereof, and the plaintiff having filed his amended verified statement, the entire amount was taxed and allowed by the clerk, and upon appeal from such taxation, the court affirmed the same, declaring that the "finding and taxation of costs and disbursements by the clerk of the court are legal and correct." From this judgment this appeal is taken.

George H. Burnett, for Appellant

W. M. Kaiser, for Respondent.

STRAHAN, J., delivered the opinion of the court

A proper disposition of this cause requires an examination of the defendant's objections to the items claimed as disbursements, and whether such items were properly taxable. The items of plaintiff's cost bill are as follows in the circuit court:

Opinion of the Court—Strahan, J.

Trial fee.....	\$12 00
Clerk's fees.....	9 60
Sheriff's fees.....	19 80
Attorney's fees.....	5 00
Officers' fees in the trial of said cause in said justice's court as follows:	
Justice's fees.....	7 40
Sheriff's fees.....	6 25
Witness fees as follows in the trial of said cause in said circuit court:	
W. F. Boothby, one day, two miles.....	2 20
Harry Gibson, one day, two miles.....	2 20
Harry Singleton, one day, two miles.....	2 20
W. H. Byrd, one day, two miles.....	2 20
Witness fees in trial of said cause in said justice's court for Salem precinct as follows:	
W. H. Byrd, one day, two miles.....	1 70
Henry Rogers, one day, two miles.....	1 70
W. F. Boothby, one day, two miles.....	1 70
Harry Gibson, one day, two miles.....	1 70
Total.....	\$75 65

The defendant objected to the allowance of plaintiff's claim for mileage and attendance of witnesses in circuit court as follows: Harry Gibson, one day, two miles, \$2.20; Harry Singleton, one day, two miles, \$2.20; W. H. Byrd, one day, two miles, \$2.20; because said Gibson and Singleton and Byrd were not necessary or material witnesses in said action, and as to said Byrd and Singleton, for the further reason that they were not sworn as witnesses in said circuit court. The defendant also objected to the allowance of plaintiff's claim for mileage and attendance of witnesses on justice's court as follows: W. H. Byrd, one day, two miles, \$1.70; Henry Rogers, one day, two miles, \$1.70; Harry Gibson, one day, two miles, \$1.70, because said Byrd, Gibson and Rogers were not necessary or material witnesses in said action, and as to said Rogers,

Opinion of the Court—Strahan, J.

for the further reason that he was not sworn as a witness at the trial of said action in the justice's court.

The plaintiff essayed to meet defendant's objections to the claim for the witness Rogers by the following statement in his amended verified statements: "Plaintiff alleges that the witness, Rogers, was necessary and material in the trial of said cause in the justice's court, for the reason that the defendant, by his answer, raised the issue as to whether or not said plaintiff performed the work sued for by plaintiff, and said Rogers was a material witness to show that plaintiff did superintend said work and labor on said drug store building, but he was not sworn for the reason that defendant, on the trial of said cause in said justice's court, admitted that plaintiff did said work and labor as alleged."

Opposed to the defendant's objections to the other witness fees, both in justice's and circuit courts, the amended verified statement of plaintiff contains the following: "The witnesses W. H. Byrd and Harry Gibson were necessary and material witnesses on the trial of said cause in said justice's court for the reason that the defendant made the defense therein in such trial, that the account sued for by plaintiff was assumed by said Harry Gibson and Harry Singleton, and that plaintiff was to look to them for his money; that this defense by defendant rendered it absolutely necessary to call said Harry Gibson and W. H. Byrd to dispute the same, which they did in said justice's court. That Harry Gibson, Harry Singleton, and W. H. Byrd were necessary and material in the trial of said cause on appeal in the said circuit court, for the reason it was necessary to have such witnesses subpoenaed on the trial of said cause in said circuit court, and plaintiff paid said witnesses their fees in advance by the said sheriff; that the defendant never notified plaintiff that he would abandon said defense relied on in said justice's court; that said witnesses were not sworn for the reason that defendant abandoned such defense in the circuit court, and said plaintiff had every reason to believe that defendant would

attempt the same defense in the circuit court, which would render said witnesses necessary. The defendant attempted by such defense in said justice's court to show his non-liability to plaintiff, and by these witnesses plaintiff could show that the account had not been transferred to or assumed by said Gibson and Singleton, and that said plaintiff had no knowledge of any such transfer or assumption of said account sued on."

The clerk of the circuit court overruled defendant's objections to the various witness fees, not because the witnesses were shown to be material in the prosecution of the action, but because, as he puts it in his allowance, "they were regularly subpoenaed and paid for their attendance." The sheriff charged \$19.80 for his fees in the circuit court and the defendant objected to the entire amount except the following items:

Serving notice of appeal.....	\$ 25
Making and delivering copy of notice of appeal.....	40
Mileage, serving notice of appeal, two miles.....	20
Serving subpoena on W. F. Boothby.....	25
Making and delivering copy of subpoena.....	10
Mileage, serving same two miles.....	20

Amount.....\$1 40

The sheriff charged \$6.25 for his fees in justice's court, and defendant objected to all of that sum except the following, which are taken from the schedule of constable's fees established by law, as the service could have been performed by a constable and is paid for by constable's fees:

Serving justice's summons.....	\$ 50
Mileage on same, two miles.....	20
Attending court.....	50
Serving subpoena on W. F. Boothby.....	50
Mileage on same.....	20

Amount.....\$1 90

 Opinion of the Court—Strahan, J.

The appellant claims that these are the only services performed by the sheriff in either court for which he is permitted to make any charge, and that the amount allowed by law for the same is correctly set out in his objections.

The following are the charges of the sheriff for services in the justice's court which are claimed to be illegal for the reason that the schedule of constable's fees makes no allowance for the same:

Making copy of summons.....	\$ 20
Serving copy of complaint.....	50
Five charges for certificate and return.....	1 25
Four charges for copying subpoena.....	80
Making copy of notice of appeal.....	30
Serving same.....	50
Mileage on same.....	20
Return on same.....	10

The following are excessive and unnecessary:

Excessive mileage on service of summons.....	40
Serving three subpoenas (immaterial witnesses)....	1 50
Mileage on same	60

Total overcharge in justice's court.....	\$6 35
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It is claimed by the appellant that the following are the only items for services by the sheriff in the circuit court properly taxable:

Serving notice of appeal.....	\$ 25
Making and delivering copy of notice of appeal, four folios at ten cents.....	40
Mileage serving same, two miles.....	20
Serving subpoena on W. F. Boothby.....	25
Making and delivering one copy of same, one folio..	10
Mileage on same, two miles.....	20

Total.....	\$1 40
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Opinion of the Court—Strahan, J.

The appellant claims that the following charges by the sheriff are illegal because there is no law providing for their payment:

Four returns on subpoenas	\$ 40
Mileage to pay fees advanced.....	60

The following are excessive and unnecessary:

Excessive charges copying one subpoena.....	10
Excessive mileage serving one subpoena.....	20
Serving three unnecessary subpoenas	75
Copying same.....	60
Mileage on same.....	1 20

Total overcharge in circuit court.....	\$3 85
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These several charges will now be separately examined—first, as to the claim for witness fees paid Henry Rogers. I think the answer presented an issue as to whether or not the plaintiff performed the work and labor mentioned in the complaint, and the plaintiff had the right to subpoena witnesses to support his allegations, and that in such case, if the defendant upon the trial conceded that the plaintiff did the work, thereby rendering it unnecessary to call witnesses to prove it, he may still charge for the attendance of such witnesses. The allowance for Henry Rogers' attendance in the justice's and circuit courts is affirmed.

2. Henry Gibson and W. H. Byrd attended as witnesses in the justice's court and were not sworn, and the plaintiff seeks to recover for their attendance. If a witness attend upon the trial of a cause and is not sworn, the party causing him to be present cannot recover from the adverse party the expense incurred for such witness, unless some sufficient reason exists which would legally excuse his failure to testify. In other words, it must be made to appear that his attendance was necessary at the time, but that by reason of some unforeseen or other sufficient cause it become unnecessary for such party to cause such witness to be sworn. The plaintiff has assumed this to be the law and has endeavored to give a reason why these wit-

Opinion of the Court—Strahan, J.

nesses were not sworn. According to his version of the matter, it was to meet an issue not made by the pleadings. This he could not properly do. He was bound to assume that the only issues triable in this cause were such as were made by the pleadings, and if he subpoenaed witnesses to testify to matters outside of such issues, he did so at his peril. No doubt there may be cases where collateral questions may be inquired into upon the trial, and a party may bring witnesses to testify in relation to the same, but before he can properly charge as disbursements the expense incurred in procuring the attendance of such witnesses, he must show that the attendance was necessary. The attendance seems to have been unnecessary, and the witnesses not having been sworn or testified in the cause, the items objected to must be disallowed.

3. Harry Gibson, Harry Singleton and W. H. Byrd also attended as witnesses in the circuit court, but they were not sworn, and the reason given for their attendance in the amended verified statement is wholly insufficient, and the claim for their per diem and mileage for attendance in that court must be disallowed for the same reasons stated respecting Byrd and Gibson.

4. The next objection is to the charge made for fees paid to the sheriff for services in said cause rendered in the circuit court amounting to \$19.80. The defendant concedes he is entitled to \$1.40 and no more. It was held by this court in *Jackson v. Siglin*, 10 Or. 93, that the statutes which give costs are to be construed strictly, and that the rule is inflexible that an officer can demand only such fees as the law has fixed and authorized for the performance of official duties. And on every occasion where the question has been presented to this court, charges for constructive services have been constantly disallowed, and it would seem too plain for argument that an officer can make no charge for any act performed by him by virtue of his office unless the legislature has by some statute authorized such charge. The sheriff's claim is itemized, and inasmuch as the items occur in chronological order, it will be most

 Opinion of the Court—Strahan, J.

convenient to consider the claim for services rendered in the justice's court and the circuit court together, but a different rule is provided by statute as to amount of compensation. If the service were rendered in a justice's court, the sheriff must charge the same amount allowed a constable for that service, and no more; and if rendered in any court where a constable is not permitted to act, his fees are governed by the sheriff's schedule of fees. Hill's Code, § 2340. The following charges are made by the plaintiff for money alleged to have been paid for services in the justice's court for which the law has provided no compensation, and the same are not, therefore, taxable as disbursements, but the compensation provided must be intended to include these items:

Making copy of summons.....	\$ 20
Serving copy of complaint.....	50
Certificate and return.....	20
Making copy of subpoena.....	20
Certificate and return.....	20
There are three other copies of subpoenas with a certificate and return, for each amounting to.....	1 20
Making copy of notice of appeal.....	30
Return	10
Serving subpoena on Gibson and Byrd, 50 cents each	1 00
Total.....	\$3 90
To which must be added per diem claimed for Gibson and Byrd and disallowed	3 40
Total disallowed in justice's court.....	\$7 30

When the sheriff consents to act as constable and to discharge duties which a constable is authorized to perform, he can charge no other or different fees than are allowed by law to a constable for the same services; and if as sheriff he may charge for making copies pertaining to service of papers in courts of record, he cannot do it in justices' courts.

 Points decided.

The following charges for disbursements in the circuit court are claimed by the plaintiff and disallowed:

Four returns by sheriff, 10 cents each.....	\$ 40
Mileage to pay fees advanced.....	60
Henry Gibson.....	2 20
Harry Singleton.....	2 20
Dr. Byrd.....	2 20
Serving three unnecessary subpoenas.....	75
Copying same.....	60
Mileage on same.....	1 20
<hr/>	
Total overcharge in circuit court.....	\$10 15
Add amount disallowed in justice's court.....	7 30
<hr/>	
Total.....	\$17 45

This amount must be deducted from \$57.62, the amount allowed the respondent in the court below, leaving the amount of costs and disbursements which the plaintiff is entitled to recover \$40.17. The defendant objected in the court below to the amount of fees claimed by the clerk, and pointed out the several items which he claimed were taxable and that none others were proper; but he did not argue his objections here, and we therefore express no opinion in relation to the same.

The judgment of the court below is modified in the particulars above specified, and in all other respects it is affirmed.

[Filed April 21, 1890.]

GEO. M. SEALY, RESPONDENT, v. CAL. LUM CO.,
APPELLANT.

SPECIAL APPEARANCE—OBJECTIONS TO SERVICE—ANSWERING OVER—EFFECT THEREOF.

—A defendant cannot answer and make a full defense on the merits without making a general appearance in spite of his special appearance, and when he does so, he invokes the judgment of the court and submits himself and his rights to its jurisdiction, and can no longer be heard to say that it had no jurisdiction over his person.

APPEAL from Coos county: R. S. BEAN, judge.

Opinion of the Court—Lord, J.

LORD, J., delivered the opinion of the court:

This is an action to recover money. The facts out of which the question arises to be determined are these: That on the return of the proof of service as endorsed on the summons, the defendant by its attorneys filed the following motion: "Now comes the defendant, by John A. Gray and Shedden F. Wilson, its attorneys, and appearing specially and for the purposes of this motion only, moves the court to set aside the summons in the above-entitled action, and also the service thereof, for the reason that the said summons and the service thereof are defective and not in accordance with the laws of the State governing the same." The court overruled the motion, and the defendant then and there excepted. Thereupon the defendant, by its said attorneys, moved the court for leave to answer, which being granted, it filed its answer, to which the plaintiff filed his reply; and after a trial, the verdict and judgment was for the plaintiff, and from which this appeal is taken. The error assigned is in overruling the motion of the defendant to vacate and set aside the summons served therein and the service thereof.

The contention of the defendant and appellant is that its subsequent appearance in the trial of the cause did not waive the error of the trial court in overruling its motion to set aside the service. The argument is, that it is only when the defendant pleads to the merits in the first instance without insisting upon the defects in the service, that such objection can be considered as waived; that when the defendant appears specially and for the purpose of calling the attention of the court to such defects, and the court overrules his objection, and he is thereby compelled to answer to avoid judgment from being taken against him, he will not be deemed to have abandoned his objection to the jurisdiction because he does not submit to further proceedings without contestation. *Harkins v. Hyde*, 98 U. S. 476. In *Lyman v. Milton*, 44 Cal.

635, and *Kent v. West*, 50 Cal. 185, it was held in the one case that a party was entitled to appear specially and move to set aside the service of an illegal summons, and in the other to set aside the service of the illegal service of a legal summons; and further, that the wrongful refusal of such motion was an error that was not waived by the defendant's subsequent appearance and trial of the case.

On the other hand, the contention of the plaintiff is that the defendant, by its subsequent appearance and trial of the cause, waived the motion to set aside the summons and service thereof as defective and submitted itself and its rights to the jurisdiction of the court. In *Kinkade v. Myers*, 17 Or. 471, the party appeared for the specific purpose and no other of setting aside the service, because it was alleged to be illegal, and it was held that he might make such special appearance, and that in so doing he did not waive such defects or submit himself to the jurisdiction of the court. See also *Ling v. N. P. R. R. Co.*, 10 Saw. 19.

But the question here presented is, whether, when he appears specially for a specific purpose named and the ruling is adverse to him, he can subsequently appear and contest the cause at every point without submitting himself to the jurisdiction of the court. In a word, does not his subsequent appearance concede jurisdiction, and wave the defect in the service to which he limited his special appearance? A general appearance waives all questions as to the service of process, and is equivalent to personal service. A special appearance limits the appearance to the matter specified; it is for that specific purpose and no other, and contests the jurisdiction *in limine*. To preserve his status in court, if he has appeared specially and questioned the jurisdiction, he must avoid any subsequent act which concedes jurisdiction and invokes the judgment of the court. A defendant cannot answer the complaint and make a full defense on the merits without making a general appearance in spite of his special appearance, and when he does so he invokes the judgment of the court, and submits himself and his rights to its jurisdiction, and can

Points decided.

no longer be heard to say that it had no jurisdiction. He cannot fight his side of the battle on the merits under a special appearance. The law will not allow him to occupy an ambiguous position to avail himself of its jurisdiction when the judgment is in his favor, and to repudiate it when the result is adverse to him. He ought to do one thing or the other—either fight it out on the line of his special appearance; or, if he appear and go to trial, accept its incidents and consequences.

According to this view, the subsequent appearance generally of the defendant to defend the action was equivalent to personal service, cured or waived the defect in the process or service to which the special appearance was limited, and cannot be availed to question the jurisdiction.

It may not be amiss, however, to say that I am not entirely satisfied that an answer to the merits waives an objection duly made to an illegal service of a summons which is questioned by a special appearance; but it is thought by the court that the better reason is with those authorities which hold that a party waives his objections to a defective summons or a defective service of a legal summons whether overruled or not, when he subsequently appears generally and defends the action.

It results that the judgment must be affirmed.

[Filed April 21, 1890.]

BENJAMIN JANEWAY, RESPONDENT, v. JAMES M.
HOLSTON, APPELLANT.

BILL OF EXCEPTIONS—WHAT IS NOT.—The stenographic notes taken at the trial of a cause, transcribed in full and copied in the record and signed by the trial judge, to which are prefixed a statement calling it a bill of exceptions, and the further statement that the following exceptions will be relied upon by the defendant, followed by a reference to the testimony of sundry witnesses, giving the page; all the cross-examination of a certain witness on a particular subject; all the testimony introduced on the part of the defendant; charge of the court to the jury, giving pages and certain lines,—do not constitute a bill of exceptions, or present anything for review on appeal.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

XIX. OR.—7.

19	97
22	209
22	499
23*	860
29*	438
30*	312

Opinion of the Court—Strahan, J.

STRAHAN, J., delivered the opinion of the court.

This is an action for malicious prosecution in which the plaintiff recovered a judgment for \$200 damages, from which the defendant appeals. The complaint states a cause of action and the verdict and judgment are in due form; but the appellant seeks a reversal on the ground of alleged errors occurring at the trial. For these, our attention is invited to an alleged bill of exceptions.

This paper consists of the stenographic report of the entire trial, prefixed to which is the following, after entitling the cause:—

BILL OF EXCEPTIONS.

The following constitutes the bill of exceptions in the above-entitled case, and the following exceptions will be relied upon by the defendant, to-wit:

Testimony of J. T. Smith, page 20 "a."

Testimony of A. T. Howarth, page 22 "a."

Testimony of A. M. Hoskins, page 24 "a."

Testimony of Wm. McCollum, page 26 "a."

Testimony of George Aborot, page 29 "a."

Testimony of Chas. Moore, page 30 "a."

Testimony of B. Janeway, page 12 "a."

Pages 10, 11, 12—all of cross-examination as to what witness was worth when he signed bail bond. All of the testimony introduced on the part of the defendant. Charges of the court to the jury—page 64; "a," "b," "c," "d."

The reporter's notes contain ample material from which a bill of exceptions might have been constructed, but the wildest liberty in the use of language cannot torture this writing into one. Section 230, Hill's Code, defines an exception, and section 231 points out the method of making the same a part of the record so as to present a question for review in this court; and we have several times endeavored to point out the necessity of observing these provisions of the Code in the preparation of a case on appeal. If these provisions of law be utterly disregarded, there is nothing presented which we can properly examine. It is

Statement of facts.

true we might labor through this voluminous roll of manuscript, and possibly find something which we might conceive to be erroneous; but it is not covered nor pointed out by a particular and specific exception and so separated from other matter that its identity can be known. Rather than to undertake to further define and point out the proper form of a bill of exceptions, we prefer to refer to precedents, a number of which may be found in sections 1141, 1142, *et seq.*, Green's Pleading and Practice under the Code. Any standard work on Code practice will furnish substantially the same forms.

There being no questions presented by the record for review on this appeal, the judgment of the court below must be affirmed.

[Filed April 21, 1890.]

J. P. COMBS, APPELLANT, v. S. R. SLAYTON, RESPONDENT.

WATER RIGHTS—ARGUMENT AS TO USE.—An agreement between parties who have settled upon lands in the vicinity of a stream of water capable of being utilized for the purposes of irrigation as to the appropriation of the water for such purpose and as to the relative quantity which each shall be entitled to use; and such agreement has been acted upon for a long time by the parties and a violation of it by any of them would produce irreparable damage to others, will be enforced in a court of equity.

CONTIGUOUS OWNERS—MUTUAL USE OF WATER—TACIT AGREEMENT.—Where certain parties settled upon lands as above mentioned and their lands would have been of little if any value without irrigation, and they coöperated in constructing dams and digging ditches for the purpose of conveying the water on to their respective parcels of land in order to irrigate them; *held*, in the absence of direct proof to the contrary, that it was evidence of a tacit agreement between them that each should be entitled to enjoy an equal share of the water which the stream afforded, which a court of equity in a proper case would enforce.

APPEAL from Crook county: J. H. BIRD, judge.

The appellant commenced a suit against the respondent to enjoin him from diverting water from a certain stream flowing through said county known as Ochoco creek. He alleged in his complaint that he was owner in fee of certain lands and premises situate in said county, and formerly consisting of two distinct parcels; that said creek took its rise about twenty-five miles from the premises in an easterly direction, and that when it reached a point

19	99
25	566
30	661
37	58
19	99
35	281
19	99
86	86
19	99
37	586

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about one-fourth of a mile east of the eastern boundary thereof it divided and formed two chanel, each of which ran across different parts of the premises; that the appellant used the premises for farming purposes, and that it was necessary in the use thereof to use the waters of the said creek to irrigate the land; that the respondent had disturbed him in the enjoyment of such use by tapping the main channel of the stream about one-fourth of a mile east of his premises with a ditch and appropriating the waters thereof to his own use and benefit whereby he had materially diminished the quantity of the flow across his lands and deprived him of the use of the water to his irreparable damage.

The respondent filed an answer to the complaint, denying that the said creek divided, forming two chanel as alleged; denying the diversion of the water thereof, and alleged that he was the owner in fee of certain lands and premises situated in the vicinity of the appellant, which he was cultivating for grain and other purposes, and that to insure a good crop it was necessary during the growing seasons of each year to irrigate the lands so cultivated, and that the water used for such purpose had necessarily to be brought from said creek; that in 1873 he constructed the said ditch referred to in the complaint, at great labor and expense, through the lands of J. H. Snoderly; that in building the ditch and keeping it in repair he expended in time, money and labor \$500; that it was built and the water of the creek appropriated and used by him for such irrigating purposes long prior to any appropriation or use thereof by appellant; that he necessarily required for such use about 1000 inches of the water from the creek; that after taking out of the creek such amount, sufficient water is left for the use of respondent's land; that at divers times during the last ten years the appellant has stood by and seen him expend money, time and labor in building and repairing the said ditch for the purpose of appropriating the water from said creek, and has made no mention or claim as to his right to the waters thereof; and at various times

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during said period has especially admitted respondent's right to do so; that his appropriation of said water has been with the full knowledge and with the *expressed* as well as implied consent of the appellant. The respondent further alleged that the appellant's right to claim all the waters of said creek was barred by the statute of limitations.

The appellant filed a reply denying the new matter of defense set forth in said answer, and the said circuit court thereupon appointed a referee to take and report the testimony in the case.

Said cause was afterwards heard by the court upon the report of the referee, and it found that the allegations of the complaint had not been sustained, but that those of the answer had, and thereupon dismissed the suit at the cost of the appellant, which is the decree appealed from.

George H. Williams, for Appellant.

George W. Barnes, for Respondent.

THAYER, C. J., delivered the opinion of the court.

It appears from the pleadings and evidence in this case that the appellant's premises consist of the northeast quarter of section 2, the north half of the northwest quarter and the west half of the northeast quarter of section 1, all in T. 15 S., R. 16 E. Willamette meridian; that he has been the owner of the northeast quarter of said section 2 since about the year 1870, and of the north half of the northwest quarter and the west half of the northeast quarter of said section 1 since the twelfth day of September, 1876, at which last-mentioned time he purchased the same from James McDonald, who was the owner thereof from about the year 1870 to the time of the sale to appellant.

The evidence further shows that about the year 1870 a ditch was cut from the north side or right bank of the said creek to a point northerly through a part of the land of said Snederly where it intersected a slough, or old channel,

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which extended west through the lands of said Snoderly and the appellant in the same course as the creek, northerly therefrom; that by means of said ditch the water from the creek ran into the said slough and formed one of the channels referred to in the complaint; that the water from the said slough has been used more or less ever since it was turned into it by the appellant for the purpose of irrigating his land; that about the year 1876 the respondent located and constructed the ditch in question, which is connected at its head with the former ditch, and extends northerly over the lands of Snoderly and of said Wilson for some distance, and from thence in a westerly direction through Wilson's said land across the south half of the southeast quarter and the south half of the southwest quarter of section 35 on to the southeast quarter of said section 34, the lands of the respondent; that ever since the construction of the last-mentioned ditch the respondent has used the water of said creek for the purpose of irrigating his said lands, with the knowledge of the appellant, who acquiesced in such use except when, in consequence of the low stage of water in the creek, it interfered with his (appellant's) use thereof; that after the first ditch was constructed and the waters of the creek were turned into the said slough, they washed out so large a channel that the waters of the entire creek were liable to run through it and damage the lands over which it extended; that the settlers living in the vicinity thereupon built a dam at the point of connection of the said ditch and creek; that afterwards the respondent built another dam across the ditch about 100 yards below the first one, by means of which he turned the waters into his ditch, and about the same time the appellant built another dam across the slough about 200 yards below the one built by the respondent, by means of which he took the water out to irrigate his lands.

The said lands require irrigation in order to insure a reasonable crop, and would be of little value for agricultural purposes without it. The said creek furnishes suffi

cient water for that purpose until about the first of June of each year; the flow from that time diminishes gradually until the latter part of August, when it usually ceases altogether. If the waters of the creek could be justly apportioned among the several land owners above referred to, it would doubtless enable each of them to cultivate his land with profit, and it is evident from the testimony and proofs in the case that such was the understanding among them in the outset. None seems to have claimed any exclusive right to the water, and each has generally evinced a desire to respect the rights of the others in its use.

In view of the condition of the subject matter, and of the manner in which the several parties interested have treated it, I am convinced that there was a tacit agreement among them that each should be entitled to appropriate a just proportion of the water of the creek for the purpose of irrigating his land.

Said parties were doubtless induced to locate where they did in order to secure the benefit of the water of the creek, for the purpose mentioned, and the exercise of a liberal policy in extending the privilege was best calculated to influence the greater number of persons to make permanent settlement there, which is an important consideration in the founding of a frontier community. The parties appear to have coöperated in providing facilities for using the water to render their lands productive, and they no doubt intended to afford to each an equitable share of it. None of them could have reasonably supposed that he was acquiring an exclusive right to a definite and certain quantity of the water, or that he would be permitted to use it to the exclusion of the right of the others in its use for similar purposes. Whether the respondent has appropriated more of the water than a due share thereof does not definitely appear; but he has set up an arbitrary claim to a thousand inches of it, which he insists he has secured by adverse user of a sufficient length of time to establish a right by prescription. His claim, however, is not sup-

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ported by the facts and circumstances attending the affair, and is inconsistent with the acts and conduct of the parties in the premises. He may have been entitled to the amount of water claimed for the purpose of irrigating his lands, but whether or not he was depends entirely upon the quantity which the stream was capable of furnishing. The rights of each of the parties regarding the use of the water are merely relative. Nor was the appellant entitled to an injunction restraining the respondent from diverting and using water from the said creek for the purpose of irrigating his lands unless he sought to appropriate more than a just share thereof under the implied arrangement before referred to.

There are, however, some items of testimony in the depositions which would indicate that the respondent's right to the use of the water was merely permissive; but a court of equity in such a matter will give effect to the intention of the parties as ascertained from their acts regarding it, and the circumstances connected therewith, where it is not satisfactorily shown by direct evidence.

I am fully satisfied in this case that it was the intention of the parties before named, that as between themselves to enjoy equal rights in the use of the waters of the said creek, and that they acted upon such intention in building the said dams and in the construction of said ditches, and that the same should be carried into effect.

This court held in *Coffman v. Robbins*, 8 Or. 278, that a parol agreement to divide water which passed through the lands of different persons, each of whom prepared ditches for conducting the water and took and enjoyed it for a number of years under the agreement, would be upheld and enforced in equity, although the only consideration for the agreement was the digging of the ditches and taking care of the water. The principle determined in that case is, I think, applicable to this one; and if the said parties were all before the court, I should be in favor of rendering such a decree as would enforce it, but we cannot bind persons who have not been made parties to the suit.

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There is, however, some direct proof in the case, and rather strong inferences, that the respondent has been accustomed at times to use more of the said water than he was entitled to, upon the basis suggested, and he claims an absolute right to use certain specific amounts regardless of the amount of the supply.

I am of the opinion, therefore, that the circuit court, instead of rendering the decree appealed from should have decreed that the respondent be restrained and enjoined from using any more of the water than an equal share with the other parties named, whenever there was not a sufficient quantity of it in the said stream to fully supply them all. Such a decree can be enforced in the mode pointed out in *Olmstead v. Loomis*, 9 N. Y. 423, and approved by this court in *City of Salem Co. v. Salem F. & M. Co.*, 12 Or. 387, or by any other suitable and practicable mode which may be adopted.

The contention in *Olmstead v. Loomis* was in regard to the use of water for hydraulic purposes, but I think the principle is equally applicable to a case like the present one. Under this view, the decree appealed from must be reversed, and a decree entered in accordance with the principle above laid down, and the case remanded to the said circuit court with directions to enter such decree as the decree of that court, and enforce it by such mode of procedure as to the said court may seem most suitable and proper. Neither party will be entitled to costs and disbursements in the suit or upon the appeal, but each is required to pay the costs and disbursements which he has incurred. The costs and disbursements, however, which may be incurred in the enforcement of the decree shall be taxed against the respondent in case he refuses to observe its terms.

Per Curiam.

[Filed April 14, 1890.]

**ALFRED FREEKSEN, RESPONDENT, v. EPHRIAM
TURNER, APPELLANT.**

PLEADING—UNCERTAIN ALLEGATION—REMEDY.—Where the allegations of a complaint indicate a fact, and evidence thereof is admitted under it, an exception to its admission is not tenable although the allegations regarding the fact are vague and indefinite. The remedy of the defendant in such a case is by motion to compel the plaintiff to make the complaint more definite and certain.

APPEAL from Linn county: R. S. BOISE, judge.

The facts in the case are shown in the opinion.

O. H. Irvine, for Appellant.

J. J. Whitney, for Respondent.

PER CURIAM.—This action was brought by the respondent against the appellant to recover the value of labor performed by the respondent in summer-fallowing certain land belonging to the appellant, and was tried in the circuit court by a jury. It appears from the bill of exceptions that upon the trial thereof the respondent offered himself as a witness in his own behalf, and after testifying, in substance, that he and appellant had entered into a written agreement or lease for the leasing of appellant's farm to him for the year ending October 1, 1889, which provided, among other things, for doing the summer-fallowing in controversy, his counsel asked him: "What, if any, oral agreement or understanding was made between plaintiff and defendant on the day said written contract was executed and after the execution thereof in regard to defendant paying for said summer-fallow in case he (defendant) should sell said farm or not rent the same to plaintiff for another year?"

The appellant's counsel objected to the question upon the ground that the same was incompetent—that there were no allegations in the pleadings of any modification of any written contract of rental for the year ending October 1, 1889. The trial court overruled the objection, and the witness was allowed to testify, that on the day the written

Per Curiam.

contract was executed, and after the execution thereof, the respondent and appellant made and entered into an oral agreement or contract whereby the appellant agreed to pay the respondent for said summer-fallowing, in case appellant should sell said farm, what the same was reasonably worth. The appellant's counsel excepted to the ruling, which constitutes his only ground of error relied on in this court.

We have examined the pleadings in the case and are of the opinion that the admission of the said testimony was not error affecting the substantial rights of the appellant. The respondent alleged in his complaint that on November —, 1886, the appellant and himself entered into a written contract whereby the appellant rented and leased to respondent his land, and set out the terms and conditions of the said lease. He further alleged that after the termination of said written lease, he and appellant had a further understanding that he was to occupy and cultivate said land, put the plow land into grain, harvest the grain, put one-third in the warehouse for appellant, for the use or rent of the land; that respondent continued to so cultivate the land up to the — day of September, 1889, and after the termination of said written lease it was understood and agreed between the parties that appellant was to pay respondent for all and any work done by him on said land with the exception of that which was necessarily done in putting in the grain, harvesting and storing it; that respondent duly performed all the conditions of said written contract or lease on his part, and thereafter duly performed all the conditions of said "oral agreement" or understanding between respondent and appellant on his part. It is evident that the respondent intended to count upon an oral agreement where there previously had been a written agreement between the parties by which the land was leased. It is true that the written agreement, to which the oral agreement claimed by respondent to have been supplemental, was alleged to have been made in November, 1886. If it were not, however, made at that

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time, but made as alleged by appellant in 1888, it was only a variance, and could not have prejudiced the appellant in his defense. The complaint is not a model of good pleading. It is very loosely drawn and ambiguous; but the remedy in such cases is by motion to make the pleading more definite and certain.

The judgment appealed from will be affirmed.

[Filed April 14, 1890.]

LINN W. WOODS, APPELLANT, v. THE TOWN OF PRINEVILLE, RESPONDENT.

MUNICIPAL CORPORATION—POWER TO RESTRAIN DRUNKENNESS.—The power is conferred upon the council of the town of Prineville by its charter (Session Acts, 1890, p. 116) to prevent and restrain drunkenness. Under this power the council may prohibit the furnishing or giving intoxicating liquors to an habitual drunkard or one who is in the habit of becoming intoxicated.

PLEADING—TOWN ORDINANCE.—The proceedings in a recorder's court to enforce the ordinances of a town are necessarily summary; but in pleading, the substance of all that is legally necessary must appear, and in declaring on an ordinance it is sufficient to plead its legal effect. It might have been set out in *hæc verba*, but this form is not indispensable. In declaring upon a town ordinance, it is generally sufficient if the complaint follow the descriptive words of such ordinance.

VALIDITY OF TOWN ORDINANCE—PROOF.—In enforcing a town ordinance, its passage must be made to appear, and its legality will then be determined by the charter and by what is contained in such ordinance.

APPEAL from Wasco county: J. H. BIRD, judge.

The information upon which the defendant was convicted before the recorder of the city of Prineville, is in substance as follows: "The said Linn W. Woods, on the tenth day of February, 1889, in the town of Prineville, within the corporate limits thereof, did furnish Alex. Conley intoxicating liquors, to wit, beer and whisky; the said Alex. Conley being then and there an habitual drunkard, and prior thereto having been declared an habitual drunkard by the town council by an ordinance, which made it unlawful for any person to furnish the said Alex. Conley any spirituous, malt or vinous liquors," etc. The plaintiff sued out a writ of review and brought the record into the circuit court, where the same was examined and the judgment of conviction was affirmed, from which he has appealed to

this court. Before pleading not guilty in the recorder's court the present plaintiff demurred to the information, but the same was overruled and he then pleaded not guilty.

Counsel stipulated that this cause should be heard here instead of Pendleton.

J. F. Moore, for Appellant.

Geo. W. Barnes and M. E. Brink, for Respondent.

STRAHAN, J., delivered the opinion of the court.

The argument of appellant's counsel presents five points for consideration on this appeal, but there is really but one question, and that is the sufficiency of the complaint upon which the appellant was tried before the recorder. So far as may be necessary to the proper disposition of the case, these objections will be separately noticed.

1. The first question presented is the alleged invalidity of the ordinance under which the complaint was made. That depends on the authority conferred by the charter. By section 21 of the charter, "the council has power within the corporate limits— * * * * *

"4. To license, tax, *regulate*, restrain or suppress bar-rooms, tippling houses and all places where spirituous or malt liquors are sold, billiard saloons, bowling alleys, theatrical and other exhibitions, shows and public amusement, and to suppress bawdy houses, gaming and gambling houses; *provided*, that no law or part thereof authorizing any tribunal or officer of Wasco county to grant tavern or grocery license shall apply to persons vending liquor within the corporate limits of the town of Prineville."

The plain intent of this section was to confer upon the council authority to license, tax, regulate, restrain or suppress barrooms, tippling houses, etc., and the exclusive authority to license the sale of liquors, within the corporate limits of said town.

Subdivision 15 of the same section of the charter empowers the council to prevent and restrain "drunkenness." To prohibit the sale or giving of intoxicating liquors to an

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habitual drunkard is one way of "preventing" and "restraining" drunkenness. It is not for the court to say whether it is the best way or not, nor is it material. It is evident if no liquor is sold or given to such person, to that extent the object of this provision of the charter is accomplished. I think that the ordinance, so far as it prohibits the furnishing of intoxicating liquors to an habitual drunkard, is within the powers granted by the charter and must be upheld.

2. It is next objected that said ordinance is not properly pleaded. In discussing this objection, it must be remembered that this proceeding was instituted in an inferior court, where rigid technicality would be subversive of the whole purpose of the law in the organization of such courts. There proceedings are necessarily summary; but the substance of all that is legally requisite must appear. There are two modes at common law of bringing any writing upon the record by pleading,—one was to set it out in *haec verba*, and the other was to plead it according to its legal effect, and this rule remains unchanged by any provision of our Code. The pleader evidently sought to avail himself of the latter mode, and while the matter might have been stated with greater fullness and particularity, I am not prepared to hold that it is insufficiently pleaded. The substance of so much of the ordinance as was material is stated, and from this its legal effect is apparent.

3. It is next claimed that the complaint is insufficient because it fails to allege that the defendant *knowingly* furnished the spirituous liquor, etc. On this point, so far as appears, the complaint follows the descriptive words of the ordinance, and in indictments founded upon statutes that is ordinarily sufficient. It will hardly be claimed that a stricter rule ought to be applied to this pleading.

4. It is next suggested that the validity of the ordinance was not proven, and the evidence offered was insufficient. Neither of these is presented by this record. The *passage* of the ordinance by the council was all on that subject which the town need make appear on the trial before the

recorder. When its passage was shown, its legality or illegality did not depend on proof, but upon the charter and what it contained. Whatever evidence was offered does not appear, and if it did, review is not the proper proceeding to re-try a question of fact, unless possibly in some exceptional case, which have not as yet been brought before the courts of this State.

5. It is next contended that this ordinance is in conflict with the general statute of the State, which makes it unlawful for any person to knowingly sell any spirituous or intoxicating liquors to any intoxicated person or to any person in the habit of becoming intoxicated. Session Acts, 1876, p. 8. The course of legislation in this State and the tendency of judicial opinion are to leave this question in the hands of municipalities. Charters with enlarged powers have been constantly granted to the cities and towns, to enable them to deal with it in such manner as their particular condition may require. The charter of the town of Prineville is an example of that character. Counsel for appellant cite *Barton v. La Grande*, 17 Or. 577, as tending to support his objections to the insufficiency of this complaint; but the main question there was the construction of the charter relating to the right of appeal, and in what cases the writ of review was the appropriate remedy. The sufficiency of a complaint in such case was not involved. Such legislation as that under consideration relates to the peace and good order of the town. It is an exercise of the police power of the State, confided to the authorities of the town by the charter, and as long as it is kept within proper limits will be steadily upheld.

The judgment of the court below will be affirmed.

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[Filed April 14, 1890.]

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**LUTE SAVAGE, APPELLANT, v. JOHN SAVAGE ET AL.,
RESPONDENT.**

PARTITION OF LANDS—STATUTE.—The right to partition lands is regulated by statute in this State.

PARTITION—REVERSIONER OR REMAINDERMAN.—Prior to the enactment of section 423, Hill's Code, a partition suit could not be maintained by a reversioner or remainderman, and the rule is unchanged by the Code.

REVERSIONERS—REMAINDERMEN.—They may be made *defendants* in a suit for partition, but there is no statute in this State which enables them to sue as *plaintiffs*.

PARTITION—WHO MAY SUE.—The right is only given to one having actual or constructive possession of lands sought to be partitioned. A remainderman or reversioner has neither, but simply an estate to vest in *future*.

SEISIN—POSSESSION.—Seisin and possession as now understood mean substantially the same thing. To constitute seisin in fact, there must be an actual possession of the land; to constitute seisin in law, there must be a right of immediate possession according to the nature of the interest.

LIFE TENANT—RIGHT OF ENTRY—PARTITION.—Where the life tenant is in possession and there is no present right of entry in the remainderman or reversioner, they are not constructively seized.

APPEAL from Marion county: R. P. BOISE, judge.

This is a suit for partition. The complaint alleges that the plaintiff and the defendants, with the exception of the defendant Ellen Savage, are the owners in fee simple and tenants in common and hold and are in possession of the lands sought to be partitioned, and which are particularly described in the complaint. It is then alleged that the said defendant Ellen Savage has a life estate in and to said lands which constitute her entire interest in and to the same. John Savage, one of the defendants, demurred to the complaint for the reason the same does not state facts sufficient to constitute a cause of suit, which was sustained by the court below, and a final decree entered dismissing the suit, from which the plaintiff has appealed.

W. H. Holmes, for Appellant.

J. J. Murphy, for Respondent.

STRAHAN, J., delivered the opinion of the court.

It was conceded upon the argument of this cause that the defendant Ellen Savage has a life estate with all of its incidents in the land sought to be partitioned, and that

the plaintiff with the defendants, except Ellen Savage, have either the remainder or reversionary interest therein, and none other, and the question presented and argued was, whether or not, under such state of facts, the plaintiff could maintain this suit.

The right to the partition of lands is regulated by statute in this State, and consequently an examination of the sources of jurisdiction, and whether it was originally at law or in equity, or was exercised concurrently by both jurisdictions, would be unprofitable. Section 423, Hill's Code, provides: "When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, a suit may be maintained by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners." This provision has been the law here ever since the twenty-second of December, 1853, at which time it was enacted by the Territorial legislature, and by its terms took effect on the first day of May, 1854. Laws of Oregon, 1855, pp. 152, 159.

It was copied almost literally from the Code of Civil Procedure of the State of New York. New York Annotated Code, § 1532.

Before proceeding to an examination of the provision of the Code, it may be well to see what was the rule prior to its enactment. In *Evans v. Bagshaw*, L. R. 5 Ch. Rep. 340, the Court said: "The case, therefore, falls within the ordinary rule that the court will not allow a partition suit to be maintained by a reversioner. This rule is not merely technical, but is founded on good sense in not allowing the reversioner to disturb the existing state of things. There might be a tenant for life of the whole, and several tenants in common in reversion, in which case the inconvenience would be obviously very great. At all events, the rule is unquestionably settled." And this was affirmed on appeal; L. R.

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8 Eq. 469. The very case supposed by the court is actually presented by this record. So in *Striker v. Mott*, 2 Paige Ch. 387, it was held that a party who had a future contingent interest in an undivided share of real estate, could not sustain a suit for partition of the property.

This case was decided in 1831. *Brownell v. Brownell*, 19 Wend. 367, involved the same question, and arose under the statute rendering possession necessary to the maintenance of the suit, and while holding that an actual *pedis possessio* was not necessary, still the plaintiff must then have been entitled to the possession, and that she would not be entitled until after the termination of the estate for lives; and that a partition made at that time might be a very unequal one at the termination of such lives. The distinct question here presented came finally before the court of appeals in *Sullivan v. Sullivan*, 66 N. Y. 37, and the decision was adverse to the views of the appellant in this case.

The distinction drawn by most of the authorities in relation to remaindermen and reversioners as plaintiffs and defendants must not be overlooked. It is the gist of the present controversy. It is conceded by all the authorities, and I think plainly provided for in the statute, that they may be made *defendants*, and the effect of a decree *against* them as well as others is declared by section 432, Hill's Code; but in this State there is no provision of law which enables them to come into court as *plaintiffs* and compel the tenant for life to submit to a partition.

In *Sullivan v. Sullivan*, *supra*, it was held, that although remaindermen and reversioners might be made parties defendant to an action, they could not institute the action, at least as against others not seized of a like estate in common with them. The right is only given to one having actual or constructive possession of the lands sought to be partitioned. A remainderman has neither, but simply an estate to vest in possession *in futuro*. And the court said: "There was no tenancy in common by the plaintiff with either of the defendants, and the plaintiff did

not hold and was not in possession, either actually or constructively, of any part of the lands sought to be partitioned. We think it too well settled by authority, as well as upon principle, that a remainderman cannot, against others not seized of a like estate in common with him, maintain the action to disturb the rule. If the action should be extended and the benefit given to other parties, it must be done by legislation." No doubt, acting upon the suggestion of the court in this case, the legislature of the State of New York thereafter amended section 1533 of the Code of Civil Procedure, whereby it was provided: "Where two or more persons hold as joint tenants or as tenants in common, a vested remainder or reversion, any one or more of them may maintain an action for the partition of real property to which it attaches, according to their respective shares therein, subject to the interest of the person holding the particular estate therein, but no sale of the premises in such action shall be made except by and with the consent, in writing, to be acknowledged or proved and certified in like manner as a deed, to be recorded by the person or persons holding such particular estate or estates; and if in such action it shall appear in any stage thereof that partition or sale cannot be made without great prejudice to the owners, the complaint must be dismissed."

Now, if the rule contended for so ably by appellant's counsel had prevailed in New York prior to the enactment of this statute, its enactment was superfluous and wholly unnecessary. It was passed not to settle a disputed question of law, but to confer a new right upon remaindermen and reversioners after it had been solemnly adjudged by the court of last resort that they did not possess such right under the then existing law, and the recognition of such right here by the court would be nothing less than plain judicial legislation. It would amount to the introduction of the rule here by the court, which required an express act of the legislature in the State of New York to introduce there.

Opinion of the Court—Strahan, J.

Seisin and possession, as now understood, mean the same thing. To constitute seisin in fact, there must be an actual possession of the land; for a seisin in law, there must be a right of immediate possession according to the nature of the interest, whether corporeal or incorporeal. 1 Wash. Real Prop. 62.

Under this view there can be no seisin in law where there is not a present right of entry. And where the life tenant is in possession and there being no present right of entry in the remainderman or reversioner, they are not constructively seized, and neither can maintain a suit as *plaintiff* for partition. The authorities generally sustain this view. *Bonner v. The Proprietors of Kennebeck*, 7 Mass. 475; *Rickard v. Rickard*, 13 Pick. 251; *O'Dougherty v. Aldrich*, 5 Denio, 385; *Burhan v. Burhan*, 2 Barb. Ch. 398; *Whitten v. Whitten*, 36 N. H. 326; *Stevens v. Enders*, 13 N. J. 271; *Tabler v. Wiseman*, 2 Ohio St. 207; 3 Pomeroy's Eq. Juris. § 1388, note 1.

Counsel for appellant claims that because persons owning interest in remainder or reversion are mentioned in section 432, Hill's Code, as *defendants* who are bound by the decree, that therefore the same persons may be *plaintiffs*; but the conclusion does not follow. One conclusive answer to this argument is that the legislature has not seen proper to open the door wide enough to let them into court as *plaintiffs*, but has, by the section referred to, and other sections in the same connection, authorized such persons to be made *defendants*. Counsel for appellants also referred to the opinion of Denio, C. J., in *Blakeley v. Calder*, 15 N. Y. 617, with much confidence. That opinion, if law, does sustain the appellant's contention; and while it was delivered by a very eminent jurist, and was concurred in by others equally distinguished, it was not then adopted as law by the court, and has never received the sanction of the court in which it was pronounced.

We think the decree appealed from is correct and must be affirmed.

Per Curiam.

[Filed April 14, 1890.]

**BENJAMIN WINDSOR, APPELLANT, v. HIRAM
SIMPKINS, RESPONDENT.**19 117
43 206

PETITION—SEISIN.—A plaintiff cannot bring a suit for the partition of land unless he be in the possession thereof. Such suit will not lie against one in the actual possession, who is holding adversely to the plaintiff. In such case the plaintiff must regain possession by action, if necessary, before he can maintain a suit for partition.

APPEAL from Polk county: R. P. BOISE, judge.

Geo. G. Bingham, for Appellant.

W. H. Holmes, for Respondent.

PER CURIAM.—The circuit court properly dismissed the appellant's complaint. The parties to the suit were not holding and in possession as tenants in common of the premises in controversy. There was no unity of possession between them regarding the said premises. According to the referee's report, Alfred Simpkins, who had purchased the premises and was in possession of them, claiming to be the owner thereof in good faith, sold and conveyed them by warranty deed to the respondent long prior to the commencement of the suit; and the latter paid the consideration price therefor "and in good faith believed that he was getting the full and complete title thereto, and has at all times since denied the rights of possession of the respondent and excluded him therefrom." The appellant had no seisin of the premises, either in law or in fact, and must recover possession of them in a proper action before he will gain such a standing in court as will enable him to maintain a suit for the partition thereof.

The decree appealed from must be affirmed.

Opinion of the Court—Lord, J.

State, where a third person indorses a bill or note before it is delivered to the payee or indorsed by him, he is *prima facie* liable as a second indorser.

In *Kamm v. Holland*, 2 Or. 60, the question was presented as to the liability a third party assumed who indorses his name in blank on the back of a negotiable paper before it is delivered to the payee and indorsed by him, and the court held that he became liable as an indorser and as such was entitled to due demand and notice of non-payment. So in *Cogswell v. Hayden*, 5 Or. 23, the court says: "The only presumption that can arise from Cogswell's indorsement is, that he intended to become a second indorser."

For its reason the court adopted the reasoning assigned in *Bacon v. Burnham*, 37 N. Y. 616, that "it must be supposed, in the absence of any proof to the contrary, that perceiving the name of the payee in the note, he indorsed it on the presumption that the name of such payee, to whose order it was made payable, would also, at some time, appear on the note, for only thus would it become negotiable." See also *Barr v. Mitchell*, 7 Or. 346. So that whatever diversity of opinion may exist or how—was the question *res integra*—we might be disposed to regard such liability in the absence of explanatory evidence, the rule of commercial law in this particular must be considered as settled.

But, while in such case, when a third person indorses a note concurrently with its execution, and at or before its delivery to the payee, the liability assumed is presumptively that of an indorser, it may be shown by parol evidence to be the liability of a joint maker, or guarantor, according to the intention of the parties as disclosed by the facts. Looking at the note with its indorsement, and upon the facts as alleged, the defendants were presumptively liable as indorsers, who waived demand, protest and notice of non-payment. In the light of our adjudications, they can not be regarded *prima facie* as joint makers, because, according to the reason assigned, in the absence of explanatory evidence, the presumption is, that the defendants

supposed that they would incur no liability until after the payee had first indorsed. According then to the facts as alleged in the complaint they are liable as indorsers, while by virtue of the facts as alleged in their reply the defendants are liable as joint makers, and the plaintiffs have recovered against them as such for that reason. This is inconsistent. Upon the complaint as it stands, there could be no such recovery, but the reply cannot obviate this defect or vary the liability. It is a part of the plaintiff's case, and the necessary facts must be alleged and proved to establish such liability. In a word, the plaintiffs cannot recover in such case, unless their complaint contain special averments showing the facts relative to the transaction which operate to charge the defendants as original promisors or joint makers. Mr. Lawson cites numerous cases, showing, in respect to these irregular indorsements, that parol evidence is admissible to prove the intention of the parties, which, when ascertained, determines their liability, but the cases cited also show that the facts were alleged in order to sustain such a recovery. Lawson's Rights and Remedies, § 1575, and note of authorities.

The complaint in *Moore v. Cross*, 19 N. Y. 227,¹ alleged the facts that the indorsement was made for the purpose of paying for coal sold and delivered by the plaintiff to the defendant on the credit of such indorsement, etc., and is referred to and adopted in 1 Abbott's Forms, p. 237, for the purpose of showing the facts necessary to be averred in such case. As the plaintiffs claim that the defendants were joint makers of the note, and that such was their understanding and contract, these are facts necessary to be averred in their complaint, and the defect was not obviated by their statement in the reply. It made the reply inconsistent with the complaint, which, upon the facts as alleged, established a different liability. The demurrer to the new matter set up in the reply should have been sustained.

It follows that the judgment must be reversed and the case remanded for such further proceedings as may be proper in the premises.

(1) 75 Am. Dec. 326.

Statement of facts.

[Filed April 14, 1890.]

**SARAH L. LUPER, OBJECTOR AND APPELLANT, v. MARY
WERTS AND L. F. SMITH, RESPONDENTS.**

WILL—WHAT CONSTITUTES—PROBATE—WHAT NECESSARY.—Under the statute of Oregon, every will, in order to be effective, is required to be in writing, signed by the testator, or by some other person under his direction in his presence, and attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator. And in order to admit the will to probate, it must be proven to have been so signed and attested, and that the testator in the case of the disposal of goods and chattels, was over the age of 18 years; and in the case of the disposal of real property, was 21 years of age and upwards, and was of sound mind.

ATTESTING WITNESS—Who is.—To prove the attestation of the will, it must be shown that the witnesses who subscribed their names to it did so at the request of the testator; that they saw him sign it, heard him acknowledge it, or observed acts which unmistakably indicated that he had signed it. The acknowledgment, however, cannot be inferred from mere silence.

PROBATE OF WILL—WHAT EVIDENCE NECESSARY.—The proof of a will should not fail because the testimony of the subscribing witnesses thereto is insufficient to establish its execution, provided it can be proven by other competent evidence, or by circumstances clearly indicating its execution; but where such proof is not made, courts have no more authority to adjudge the will effective than they would have to attempt to enforce an oral expression of a party regarding the disposition which should be made of his property at his death.

APPEAL from Linn county: R. P. BOISE, judge.

Martin Werts died in the county of Linn on the thirtieth day of September, 1888. The deceased at the time of his death was an inhabitant of said county, and left real and personal property owned and possessed by him in his lifetime, and left an instrument of writing in the form of a will and testament which purported to dispose of said property. On the fifteenth day of October, 1888, the said instrument of writing, by order of the county court, was admitted to probate in the common form as the last will and testament of the deceased. Thereafter and on the third day of November, 1888, the appellant Sarah L. Luper filed in said county court a petition to vacate the order admitting said will to probate, alleging in her petition that she was the daughter and only heir at law of the deceased, except the widow of deceased, Mary Werts, and that the pretended will was void in that the testator did not make, sign or declare in the presence of the witnesses to said instrument that

19	122
37	445
19	122
40	262
40	263
40	504
40	580
19	122
43	548
43	557

Opinion of the Court—Thayer, C. J.

the same was his last will and testament, nor was the same attested by such witnesses; that the said testator was not, at the time of signing said instrument, of sound mind and memory, and that he was induced to sign the same by undue influence exerted over him by said Mary Werts and others named as legatees and devisees therein.

An answer was filed to the said petition by the respondents, the administrators, with the will annexed, of the deceased, denying the allegations thereof as to the unsoundness of mind and memory of the deceased, as to the undue influence, and as to the will not having been properly attested by the witnesses.

A large amount of testimony was taken on both sides bearing upon the said issues and upon which the said county court decreed that the said order admitting the will to probate be revoked and the said will set aside, upon the ground that the same had not been duly attested; from which decree the respondents took an appeal to the said circuit court, where the matter was again heard and a decree rendered reversing the decision of the county court and determining that the said instrument of writing was a valid will of the said testator and duly executed as such. From which decree the appeal herein was taken.

Hewitt & Irvine and Chas. E. Wolverton, for Respondents.

J. K. Weatherford and W. R. Bilyeu, for Appellant.

THAYER, C. J., delivered the opinion of the court.

It appears from the allegations and proofs herein that one Martin Werts and Mary Werts were husband and wife; that at the time of their marriage said Martin was a bachelor, and said Mary, a widow, had been the wife of one Smith, by whom she had several children then living; that after the marriage, said Martin became the head of the family, and nurtured and supported the said children during their minority; that he and the said Mary had, as the fruit of their marriage, a daughter, the said Sarah L. Luper, appellant herein; that after the said Martin Werts arrived at the age of about 70 years and became enfeebled

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in health, he conceived the idea of making a will disposing of his property, which consisted mainly of a tract of land in the town of Tangent, Linn county, and employed one J. J. Beard, a resident of said place, who was supposed to have some skill as a scrivener, to prepare it for him; that the said Beard subsequently prepared a writing, to which the said Martin Werts, on the seventeenth day of July, 1888, subscribed his mark, and which was also subscribed by M. Peyser and said Beard as witnesses. The said instrument is as follows:

"This is my last will and testament: I give to my wife all of my farm and appurtenances, also my houses and lots in Tangent, during her natural life; also all the personal property she can dispose of at her will; and at her death the farm shall be divided as follows: That part of my farm lying north of the county road running through my farm shall be divided equally north and south. I give to Sarah Luper, my daughter, the east half of said land, containing (82) eighty-two acres, more or less; and the west half I give to Mary E. Simpson, the wife of J. H. Simpson, and all of the farm lying south of said county road I give to my granddaughter Mary Smith; also give my organ to Mary Smith; I also give my house and lots in Tangent (at the death of my wife Mary Werts) to Lucinda Smith, the wife of L. F. Smith. I name and request E. L. Bryan to be the executor of this will.

"Witness:

"M. PEYSER.

"J. J. BEARD.

"His
"MARTIN X WERTS.
"mark.

"Dated this 17th day of July, 1888."

The said Sarah L. Luper, mentioned in said writing, was the daughter of the said Martin Werts; the said Mary E. Simpson, a daughter of his wife by the former marriage; the said Mary Smith, a granddaughter of his wife, a daughter of her son, by the former marriage, and the said L. F. Smith, husband of the said Lucinda Smith, was a son of the wife by her former marriage. Mary Smith, the

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granddaughter, had resided with Martin Werts from the time she was six months old and been reared by him and his wife as their child.

That the said Martin Werts, at the time he executed the said writing, was competent to make a will, I think was established by the evidence beyond a question. He was able to comprehend the condition of his property, his relations to the persons who were, should or might have been the objects of his bounty, and the scope and bearings of the provisions of the writing he intended as his will; which was held by this court in *Chrisman v. Chrisman*, 16 Or. 127, to be sufficient evidence of testamentary capacity. Nor do I think that the evidence in the case was sufficient to warrant the presumption that undue influence was exercised over the said Werts in regard to the disposition which he should make of his property in view of death, or which induced him to execute the said writing he intended as his will. Nor do I discover from the provisions of the writing any evidences that the signer of it was actuated by a spirit of bias or prejudice against any one who might be expected to be the recipient of his bounty, or in favor of any one upon whom he sought to bestow it. His bequest to his wife, of his real property during her natural life, and all the personal property, absolutely was, under the circumstances, a just and wholesome provision, and displayed wisdom and forethought. She was an old lady and was entitled to security against want and dependence and to that attention which the possession of property commands. Why he attempted to bequeath to Mary E. Simpson a part of his farm or to Lucinda Smith the house and lots in Tangent, does not appear; but it certainly was not strange or anomalous under the circumstances of their relations. And the bequest to Mary Smith, a child he had raised from an infant, and who was still of a tender age requiring provisions for her support and maintenance, was very natural and proper. The appellant, it is true, was his own child, and it would ordinarily be expected that he would bestow the main part of his property upon her; but he was under

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no legal or moral obligation to do so. She had a husband, and her father may have considered that her pecuniary circumstances were already adequate to her condition in life. Children have no vested rights in the property of their father while he is living, or any interest in it beyond a bare expectancy, the realization of which depends entirely upon his will; and if he were to disinherit them it would not affect the validity of his will, except as it evinced an unnatural feeling which, if proved to have been engendered by some designing party, might be evidence of undue influence. The more serious question in the case is, whether the said writing was executed with the formality which the law requires in the execution of wills. The statute of this State, § 3069, Ann. Laws, provides: "Every will shall be in writing, signed by the testator, or by some other person under his direction, in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will, in the presence of the testator." And it was held by this court in *Hubbard v. Hubbard*, 7 Or. 42, that "where a will has been probated in common form, and the validity of the will is attacked by direct proceedings, it lies upon the person seeking to maintain the validity of the will to re-probate the same by original proof in the same manner as if no probate thereof had been had, except as to such matters as are admitted by the pleadings. In every such proceeding the *onus probandi* is upon the party propounding the will." This seems to be regarded as the proper rule upon the subject, and I believe it to be correct in principle. The formal probate having been made *ex parte*, is not considered of any importance when the validity of the will is attacked by a direct proceeding. The practice, however, in such cases would be very much simplified if the legislature were to require the probate court, when a petition for the probate of a will was filed, to issue a citation to be served upon the parties interested in the estate, to show cause why the will should not be admitted to probate, and have any contest which might be made against it determined upon the

return of the citation. In the latter case the burden of proof, to show that the will offered for probate was executed according to law, would be upon the proponent; and the court, in *Hubbard v. Hubbard*, *supra*, seems to have concluded that the same rule would obtain upon a direct attack of the validity of the will after a formal probate thereof had been had, which seems to me to have been a reasonable conclusion.

The determination, therefore, that the said paper signed by the decedent, and evidently intended as his last will and testament, was executed in conformity with the requirements of the section of the statute above set out, must depend upon the sufficiency of the evidence given upon the part of the proponents to establish the fact.

The legislature, for obvious reasons, required the observance of certain forms in the execution of a will. It requires that the will shall be attested by two or more competent witnesses, subscribing their names to it. The said paper was signed by two persons, who were competent to be witnesses; but whether they attested it as required by the statute, is the question to be solved under the evidence given, and facts and circumstances surrounding the transaction. Proof of the attestation does not alone depend upon the testimony of the subscribing witnesses to the will; the latter may have both died, still the proof could properly be made. In the latter case, proof that their signatures to the will were in their own handwriting, would probably be sufficient; but in this case the proponents have attempted to establish proof of the attestation by the testimony of the subscribing witnesses and that of others.

The testimony upon that point is substantially as follows: J. J. Beard, one of the subscribing witnesses, in answer to interrogatories propounded to him, testified that he was 44 years old, resided at Tangent, and was a railroad agent; that he had resided there since 1873; that he was acquainted with Martin Werts in his life-time, had been acquainted with him twelve or thirteen years; that he transacted

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business for him; made out a deed, acknowledged a mortgage and wrote out a will for him; that the will was made July 17, 1888, at the request of Werts, who told him what provisions to make in the will at the time it was made, the names of the legatees mentioned in the will and all the terms thereof.

Question. Did he seem to comprehend at that time what property he had? Answer. He named over what is mentioned in the will.

Q. State whether he seemed to know and comprehend the names of the heirs and those dependent on his bounty?

A. He named over all that are mentioned in the will.

Q. Where was the will written? A. At my office at Tangent, Linn county, Oregon.

Q. Where was it signed? A. At the same time.

Q. State how it was signed. A. Mr. Werts signed it by a mark.

Q. What kind of a mark and who made the mark? A. It was a mark made with a pen and ink, a cross; I made the mark while Mr. Werts had hold of the end of the pen.

Q. Who wrote the name at the bottom "Martin Werts" and the words "his mark" above and below the cross? A. I did.

Q. At whose request? A. Well, I don't know whether he requested me to write it or not; I don't think he did; I asked him if he could sign it, and he said no, he couldn't write; I wrote his name and asked him to make his mark.

Q. Did you know whether it was his desire to have you write his name for him, or not? A. I do not know whether it was or not, but presume it was.

Q. State whether he knew you wrote it, and assented to your writing it? A. I told him I wrote it; don't know that he made any remark; don't know that he said anything at all.

Q. He made his mark as you have described after the will was written? A. Yes, sir.

Q. State whether the will was read to him or not? A. Yes, sir; it was.

Q. Before or after he signed it? A. Before he signed it.

Q. State whether or not he was satisfied with the provisions contained in it, when it was read to him? A. He did not say whether he was or not.

Q. What did he say when you read it (the will) to him? A. I read it to him and asked him if that was right, and he said: "That is the way mother said to do it."

Q. He understood then fully what was in the will at the time he signed it? A. I read the will to him.

Q. Who are the witnesses to the will? A. M. Peyser and J. J. Beard.

Q. J. J. Beard is yourself, isn't he? A. Yes, sir.

Q. How did you come to sign as a witness? A. There was no one else there to sign it except me and Mr. Peyser that I know of at the time.

Q. Well, you can state how you came to sign it as a witness, and why you signed it as a witness? A. I knew it was necessary to have two witnesses to it, and there was no one else there to witness it that I was aware of at the time except Mr. Peyser and myself.

Q. State whether you signed it as a witness in the presence of Mr. Werts? A. Yes, sir.

Q. State how Mr. Peyser came to sign it as a witness? A. I asked him to.

Q. How did you come to ask him to sign it? A. I wanted another witness to it, and he was the only man there and I asked him.

Q. Did Mr. Werts hear you ask him? A. I do not know that he did; I went out of the room to get Mr. Peyser; he was out on the front porch when I stepped out; he might have heard me.

Q. What knowledge did Mr. Werts have that you were about to get or were getting another witness at the time you went to get Mr. Peyser or before going? A. I presume I told him I was going to call another witness.

Q. How far did you find Mr. Peyser from where you were writing the will? A. About forty feet.

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Q. How long had Mr. Peyser been there? A. Probably ten or fifteen minutes; could not say positively.

Q. Could he have heard what you were saying to Mr. Werts? A. He might have heard part of it; don't know that he did; could if he had been listening to hear me read the will.

Q. What did you say to Mr. Peyser when you got him to witness the will? A. I asked him to come in and sign this as a witness.

Q. State what was said when he signed it? A. I believe he asked if it was a note, and I said no, and he said it would not make it any better by his name being on it than it was. I believe that was all that was said.

Q. Did Peyser know what he was signing and the capacity in which he was signing when he signed it as a witness? A. He knew the capacity in which he was signing; don't know whether he knew it was a will or not, but presume he did; couldn't say positively.

Q. Why did you presume that he knew it was a will? A. Well, he could have heard me reading it if he had been listening, and ought to have known what it was if he heard it.

Q. How long after you signed it until you called Peyser to sign it? A. I called Mr. Peyser to sign it before I signed it at all.

Q. State whether Mr. Peyser looked at the instrument and saw the manner in which Mr. Werts had signed the paper? A. I don't know whether he did or not; I called him in and he sat down and signed the paper.

Q. Did he sign after Mr. Werts had made his mark? A. Yes, sir.

Q. Was he acquainted with Mr. Werts, do you know? A. Do not think he was; do not know, but do not think he was.

Q. How long did Peyser remain in the room? A. I think he got up and went right out as soon as he signed his name. It was a very small room and there wasn't room for so many in there.

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Q. Before or after you signed it as a witness? A. I think he stepped right out of the door and I sat right down and signed it; he wouldn't have to step but a couple of feet.

Q. Did Peyser know that you were signing also as a witness? A. I do not know whether he did or not.

Q. How long after that did old man Werts leave the office? A. Well, right away; he got up in a very few minutes; he went out, I think; he and Mr. Peyser went out into the front part of the store together.

Q. What directions did Mr. Werts give you regarding the will after it was executed? A. After he had gone out into the front room I took the will and asked him what I should do with it. He told me to keep it and read it after he was dead. I asked him if I hadn't better give it to Mr. Bryan, and he said it didn't make any difference, and that I had just as well keep it.

Q. Was Peyser present at this conversation. A. I believe he was in the store; yes, sir.

Here a paper was handed the witness, and he was asked: "Is that the will of Martin Werts, executed at the time referred to by you heretofore in this deposition?" Answer: This is the will that I wrote at the request of Martin Werts.

The witness further testified that he made the proof upon which the will was formally admitted to probate; that all the facts stated in the affidavit of proof, except the part thereof wherein it is stated "that he then and there declared his will to be the same as stated in his last will and testament," were true.

Mr. Peyser, the other witness to the will, testified that he was 48 years of age, his residence was Albany, Oregon, and his occupation trading; that he saw Martin Werts around Tangent, but did not know what his name was. Upon the will being shown to the witness, and he being asked if he recognized the signature "M. Peyser," and if so to state who wrote it, answered, "I wrote it myself." That the way he came to write it, he was at Tangent on

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business, and Mr. Beard called him to witness a paper and he did so.

Question: What other signature, if any, did you see attached to the instrument at the time you signed your name? Answer: I saw a name there, but did not pay any attention to it whatever.

Q. Point out the name you saw on the paper at the time you signed your name there? A. I couldn't do it; I didn't pay no attention to the name.

Q. Was the name you saw at the time you signed your name located toward the right hand side of the paper you signed or the left? A. The right side.

Q. State whether J. J. Beard's name was signed to that paper as a witness at the time you signed it? A. No, sir.

Q. State what knowledge you had of J. J. Beard signing it after you signed it? A. I have none whatever.

Q. What did J. J. Beard do immediately after you signed it? A. I could not tell what he did. He was present when I signed it as a witness; was standing right on the side of me; I think he gave me his chair; I believe it was his chair.

Q. Did you see Mr. Beard doing anything before you went out or while you were going out, and if so state what he was doing? A. I didn't take any particular notice; could not tell whether he took a seat or not or about the time I left.

Q. Where was Martin Werts at the time you wrote your name to the will? A. There was an old gentleman sitting there in the office; I didn't know his name as I was not acquainted with the old gentleman at all; I was only acquainted with him by sight; I could not tell the distance he was sitting from me when I wrote my name as a witness to the instrument, but it was not very far. He could see me plainly at the time I signed my name, if his attention had been directed toward me, or if he had wished to see me. He was in the same room with me at the time I signed it.

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Q. Where was J. J. Beard at the time he called you to witness the paper? A. He just came out of a little room where I believe the post-office was kept; I was standing in the door or on the porch of the building; I must have been twenty feet or more from the little room.

Q. Give your best judgment how far this old man who was in the room was from J. J. Beard at the time he called you to witness the instrument. A. I could not tell the distance, but Mr. Beard was standing close to me.

Q. Where was Mr. Beard at the time he called you; how far from the post-office room? A. I could not tell; I didn't take any particular notice; I cannot approximate the distance.

The witness was here shown a diagram of the ground floor of the building, showing that it was partitioned into three rooms,—a large front room occupied as a store, and two small rooms, one of which was a bedroom and the other a post-office room with a door-way between them, and one from the bedroom into the store. The store-room is about 30 feet in length.

The witness was then asked where he stood and where J. J. Beard stood at the time Beard called him to sign as a witness, to which he answered, in substance, that he stood in the front part of the building, and that Mr. Beard stood somewhere back in the store; that he came out of the post-office room and was standing near the door which goes from the store into the bedroom; that the old man was in the post-office room when witness went in there after being called by Beard; that he did not see him go into the room; thought he heard some one in the room before he went in, but did not hear anything said which he could understand. It was a human voice, but could not tell whether the party was reading or talking.

Question. What was the condition of the old man's mind at the time you signed the instrument as a witness? Answer. Well, I couldn't tell what his mind was; he looked kind of strange to me; kind of wild look on him.

Q. What did you understand you were signing your

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name to that instrument for, at the time you signed it? A. Well, I didn't understand anything; they simply called me in to witness the paper, and I made the remark: "You don't want me to sign any money matter, do you?"

Q. What was the extent of your acquaintance with the old man at the time of signing the instrument? A. Not any.

Q. You knew him when you saw him, didn't you? A. I knew him when I saw him in Tangent, but did not know his name; that is all the place to my recollection that I saw him.

J. A. McGee testified: "I heard Joe Beard reading the will; I don't know where Mr. Peyser was when the will was read; I didn't hear Mr. Werts say anything."

J. A. Sibbetts testified: "I seen Mr. Werts go into the post-office the day the will was written; I seen him at the front door at the time; some one called Peyser on the inside of the office; Peyser stood opposite the door on the outside; I recognized the voice of the person calling Peyser as that of J. J. Beard; it was simply a request to step into the office; I heard no reading or talking in the back room until Mr. Peyser was called; I heard nothing about writing a will at that time; I was sitting on a chair on the north side of the outside door when Mr. Werts entered the post-office; this was the front door of the post-office building; when Mr. Beard called Mr. Peyser, he, Peyser, was standing about three and one-half feet away and on a line with the south side of the door; I had been sitting exactly in the same position and place I have described all the time after Mr. Werts went into the post-office up to the time Beard called Peyser; can't state definitely the length of time Peyser had been on the porch prior to the time he was called by Beard; I only noticed him about fifteen or twenty minutes before he was called; it might have been longer; when Beard called Peyser, it was in just an ordinary business tone."

The foregoing is not literally all the testimony in the case upon the question of the attestation of the instrument;

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but it is the material part thereof, and unless it establishes the attestation of the alleged will, as required by the section of the Code above set out, the proponents of it must fail in their proof of its due execution.

The statute of this State, § 757, Ann. Code, defines what a subscribing witness is. He "is one who sees a writing executed, or hears it acknowledged, and at the request of the party thereupon signs his name as a witness." And I think the word "attestation," in the absence of any statutory definition, implies the same thing. A subscribing witness to a will, therefore, must be something more than a person who subscribes his name as a witness to it. The testator must either sign the will in the presence of the witness, or must acknowledge to him by word or act that he had signed it. It is not necessary that the witness know the contents of the instrument subscribed by him, or its nature or character, but he must be able to testify that the principal in the affair put his name upon the identical piece of paper upon which he placed his own. *Harlan Canada's Appeal from Probate*, 47 Conn. 450.

Counsel for the proponents at the hearing did not question the correctness of the rule as here indicated; but insisted that the facts and circumstances of the transaction authorized the inference that the decedent acknowledged the execution of the instrument. As to the witness Beard, no acknowledgment by the decedent of the execution of the instrument was necessary, as he was personally cognizant of the fact that the decedent signed it by making his mark; but the witness Peyser did not see the signing done, and could not obtain such a knowledge of its having been done as would render him a competent witness to the fact unless, at the time he subscribed the instrument, the decedent in some manner acknowledged its execution. Said counsel lay down the proposition that it is not essential in the execution of a will that the witnesses to it see the testator subscribe the instrument; that he acknowledges or adopts the signature in their presence is sufficient; that the acknowledgment is not required to be made in

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any particular words or in any specified manner, but if, by sign, motion, conduct, or attending circumstance, the attestating witness is given to understand that the testator had already subscribed the instrument, it is sufficient acknowledgment. And the counsel cite in support of the proposition the following authorities: *In re Will of Lawrence Convey*, 1 Am. Prob. R. 90; *Raudebaugh v Shelley*, 6 Ohio St. 307, 315; *Haynes v. Haynes*, 33 Ohio St. 615; *Nickerson v. Buck*, 12 Cush. 342; *Tilden v. Tilden*, 13 Gray, 110; Schouler on Wills, §§ 321, 322. This proposition, as a matter of law, is undoubtedly correct, and the authorities cited fully support it. The difficulty, however, which the said counsel have to contend with is in the application of the principle to the facts of this case.

If it appeared from the evidence bearing upon the point involved that the decedent acknowledged or adopted the signature to the instrument as his own in the presence of the witness Peyser, either from the testimony of the latter or from that of any other witness, or that by any sign, motion, conduct, or attending circumstance, he gave said witness to understand that he had already subscribed the instrument, I should not hesitate to hold, as I am at present advised, that it was a sufficient acknowledgment; but I fail to discover any evidence which would warrant such a conclusion. The evidence shows that the decedent, while the said witness was subscribing his name to the instrument, maintained "mere silence," which "is not enough." *Haynes v. Haynes*, *supra*. If the decedent had said to the witness Peyser: "This is my will," or if the witness Beard had said in the presence of the decedent and Peyser, "This is the will of Mr. Werts; he has signed it and wants you to subscribe your name to it as a witness," or used any language of that import, the contention of the proponent's counsel might have been tenable. Under the testimony, however, as it stands, I do not see how by the most liberal construction of it, Peyser could have been a competent witness to the will. He could not testify that the decedent signed the will; he did not see him sign it, and

was not informed by any one, so far as appears from the evidence, that he did sign it, or adopt the signature thereto as his own.

The facts in the case of *Nickerson v. Buck* and in *Tilden and others v. Tilden, Executor, supra*, from which the courts in these respective cases inferred that the testators to the said wills had acknowledged the execution of the same, were much stronger than in this case; yet I think the courts there, especially in the latter case, extended the doctrine of inferential evidence to its utmost verge. It is not a pleasant duty to be compelled to determine that the intention of a party to honestly dispose of his property by will and testament was thwarted by his failure to comply with an apparently technical exactment of the law; but the aim and object of the statute, in requiring the observance of certain formalities in the execution of such instruments, is entitled to due consideration. Otherwise a door to fraud and forgery, in the disposition of estates *causa mortis*, would be thrown wide open.

Counsel for the proponents strenuously urge that the witnesses to the instrument in question, in giving their testimony as to its execution, exhibited a disposition to suppress the facts regarding it; and insist that the will and testament of a party honestly made should not be defeated by the failure of memory of the witnesses nor by their false swearing. The argument viewed from a moral standpoint is undoubtedly sound; but I do not see how it can aid the proponents' case herein. They were required to prove the due execution of the will, and if they have failed in that respect in consequence of the lack of memory or the false swearing of the witnesses, it is the misfortune of those interested in the matter of its proof. If the court believed that the witnesses to the said instrument had wilfully neglected and refused to state under oath all the facts they knew concerning its execution, still it would not be authorized to hold that the instrument was a valid will of the decedent unless there was other evidence in the case showing that it was executed in compliance with the

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requirements of the statute. The proof of a will should not fail because the testimony of the subscribing witnesses thereto is not sufficient to establish its execution in accordance with the statute, provided it can be proved by other competent evidence to have been so executed; but where such proof is not made, the courts of this State have no more authority to adjudge it effective than they would have to attempt to enforce an oral expression of a party regarding the disposition which should be made of his property at his death.

Under the view herein expressed the decree of the circuit court must be reversed, and that of the county court affirmed.

LORD, J., dissenting.—Peyser is an unwilling witness, of an unreliable character, whose testimony as disclosed by the record indicates a purpose to defeat the will. That it ought not to be allowed to succeed, if it can be prevented consistently with a proper administration of the law, is admitted. The difficulty lies in determining the sufficiency of his evidence as an attesting witness. The testimony of Beard, the other witness to the execution of the will, is conceded to be competent and sufficient, and the will must stand or fall upon the sufficiency of the testimony of Peyser in the light of the surrounding facts and circumstances. Briefly the facts are these: The testator sought Beard and requested him to write his will, and together they went to a small office in the back of a store, where Beard wrote it and the testator signed it. Beard then went to the front door of the store and asked one Peyser to come into the back office and witness it, but without disclosing to him the nature of the instrument. When Peyser signed it he saw the signature of the testator to the will, who was sitting quite near him, and knew the purpose for which Peyser signed it, but he did not declare to Peyser in words that it was his signature, nor did Peyser know it other than from the fact of his presence and acquiescence under the circumstances. When the will was offered for

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probate Peyser swore that the instrument and the signature was the same as when he witnessed it, so that as to its identity there is no doubt. But the contention is that Peyser must be able to swear that he knew that it was the signature of the testator, either from seeing him write it or from his acknowledgment, by words or acts, and that the testimony of Peyser falls short of this requirement.

It is admitted that the testator is of sound mind, and that the will is the product of his own free agency; nor is it doubted, in view of all the facts in evidence, that it was executed by him as his last will and testament.

It is clear from the evidence that the testator knew what he was doing when he procured Beard to write his will and he himself signed it, and what Peyser was doing when he witnessed it, so that if there is anything in his conduct under the circumstances at the time Peyser signed which amounted to an acknowledgment that the will was executed by him, we ought so to declare, and not allow his last will and testament to be set aside and defeated. Within a little more than an inch from the place on the paper where Peyser signed as a witness was the signature of the testator, which he admits that he saw at that time, and within a few feet of him sat the testator, and no one else except Beard was present. Peyser was there at the instance of Beard, who had called him into the office to witness a document which he saw was already executed, and when he proceeded to witness it, and the testator, knowing the facts, looked on and said nothing, was not his silence, in the light of the facts, an acknowledgment that the will was executed by him?

When I see a man's name to a paper document, and he is present, and no one else except the scrivener, and I am there to witness it, and when I do so he looks on but says nothing, is not his acquiescence, under the circumstances, an acknowledgment to me that the will and signature are his own? In the light of the facts, Peyser had a right to assume and understand that the will was executed by the testator then present, because his conduct in the premises

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was declaratory of that act; and when that assumption is sustained by the undisputed testimony of the other witness, and is inconsistent with any other conclusion to be drawn from the whole evidence, it carries to the mind a declaration or acknowledgement as direct and positive that the testator, then present, executed the instrument, as if he had so declared or acknowledged it to him in words.

In determining this question, we are to consider all the facts in evidence relative thereto, and not base our conclusions upon isolated testimony of the witness Peyser; and when thus viewed, if it is clear from the attending circumstances that the testator executed the will, and that Peyser knew it, because as a reasonable being the conduct of the testator under the circumstances so informed him, it is our duty to hold such facts equivalent to such an acknowledgment, and uphold the will. In *Tilden v. Tilden*, 13 Gray, 113, the only difficulty in the case there was, as here, upon the fact of a proper attestation of the witness. The court say: "In reference to this witness, it is said there was no publication of the will by the testator, no actual signing in his presence, no direct acknowledgment that he had signed the paper, and no knowledge on the part of the witness whether the testator's signature was on the paper at that time"; and yet the court upon the evidence found that the instrument had been duly signed by the testator, and duly attested as his last will and testament. See also *Dewey v. Dewey*, 1 Met. 349; *Nickerson v. Buck*, 12 Cush. 339; *Hayes v. Hayes*, 83 Ohio St. 615; Schouler on Wills, §§ 321, 322.

There is no suggestion that there has been any fraudulent substitution of a false paper or will, nor is there any thing in the facts to countenance any such supposition. We are all convinced that the will was executed by the testator, only my associates think that the testimony of Peyser does not fulfil the requirements of the law. To my mind, in view of the facts and circumstances, Peyser could not avoid knowing that the testator, then present, executed the will; the facts so informed him and authorize the

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inference that the testator acknowledged the signature of the will to be his act, though he did not expressly so state. In my judgment, then, the facts as disclosed by this record authorize us to find that the instrument was duly signed by the testator, and was duly attested as his last will and testament. It ought, therefore, to be upheld, and his property disposed of according to its direction.

[Filed April 16, 1890.]

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A. FERRERA, APPELLANT, v. L. C. PARKE AND B. T. LACY, RESPONDENTS.

JUDGMENT OF NON-SUIT ON DEFENDANT'S MOTION—WHEN IMPROPER.—Under section 245, Hill's Code, a judgment of non-suit on the defendant's motion is improper, if the defendant was required to produce evidence to meet the plaintiff's case.

DEFECTIVE PLEADING—"EXPENSE AIDED."—A pleading which is defective by reason of the omission of some material allegation, may be aided by the pleading of the adverse party. If the omitted allegation be supplied by the adverse pleading, it is the same as if it were inserted in the party's own pleading.

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CONVERSION DEFINED.—Conversion is based on the idea of an assumption by the defendant of a right of property, or a right of dominion over the thing converted, which casts upon him all the risks of an owner, and consequently it is not every wrongful detention of property that amounts to conversion.

WHEN DEMAND AND REFUSAL NOT SUFFICIENT EVIDENCE OF CONVERSION.—A demand and refusal will not be sufficient evidence of conversion when it appears that the property demanded was not at the time in the possession or under the control of the defendant on whom the demand was made, but that it had been previously mislaid or was lost.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

This is an action to recover damages for the conversion of certain chattels. It is alleged in the complaint that on the fifteenth day of February, 1887, the defendants were partners doing business at the city of Portland, and that on that day the plaintiff was the owner and in the possession of certain personal property, to wit: "A plan and drawing of a maccaroni and feroni paste factory, and of the machinery, utensils and apparatus to be used in said factory in the manufacture of maccaroni and feroni, made and prepared for the plaintiff by E. Graverio and Company in Foce, near Geneva, Italy, of the value of \$2,500, and

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that the defendants thereafter converted the same to their own use, to plaintiff's damage in the sum of \$2,500; that before the commencement of this action, at divers times the plaintiff demanded said property of the defendants, and that they refused and still refuse to return or deliver the same to the plaintiffs. The complaint further alleges that he had expended \$500 in preparations to run and operate said maccaroni and feroni paste factory and that he was unable to begin or conduct said business by reason of said wrongful conversion, and demands judgment for \$3,000 damages.

The answer denies the material allegations of the complaint, and then alleges, as a further defense, that in the year 1887 the defendants were engaged in a machinery business in the city of Portland, Oregon, and on or about the — day of January in said year the plaintiff delivered to the defendants a plan and drawing of certain structures and machinery for the purpose of having the defendants procure for him certain machinery to comport with said plan and drawing; that while said plan and drawing were in the possession of the defendants for said purpose it became accidentally lost and defendants have since been unable to find the same. The answer then expressly admits that plaintiff demanded a return of said property and that defendants failed to return it, but that they say the demand was made after its loss. The reply denies the new matter in the answer except the delivery of said property to the defendants and the purpose for which it was delivered.

All the evidence is in the record. The plaintiff's evidence tended to prove that he delivered said property to the defendants substantially for the purpose specified in defendants' separate answer and that they were to return the same to him in ten days with their estimates; that the plaintiff continued to visit the house almost daily for nearly a year, and on many of those occasions he asked to have his plans returned to him. Finally one of the defendants told him that it was too bad, but that he had seen the same

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in San Francisco, that he had been expecting to have it returned to the plaintiff, but that the same could not be found any more. The plaintiff's evidence further tended to prove the value of said property. The plaintiff further gave evidence tending to prove that the defendant sent said plans and specifications to their house in San Francisco to get a bid there as to the cost of doing the work.

The plaintiff having rested his case, the defendants introduced evidence tending to support their defense. And then on their motion, the plaintiff was non-suited from which judgment this appeal is taken.

C. H. Carey, for Appellant.

L. B. Cox, for Respondent.

STRAHAN, J., delivered the opinion of the court.

The journal entry disposing of this cause in the court below recites that after the plaintiff had introduced his evidence in chief, and the defendants their evidence in chief, and the plaintiff his evidence in rebuttal, and the plaintiff having announced that he had no more evidence to offer, the defendants filed their written motion for judgment of non-suit, which was duly argued and submitted to the court, and by the court sustained, and then follows the usual judgment of non-suit which awards costs to the defendants. The practice on this subject in this State is regulated by section 246, Hill's Code, which provides:

"A judgment of non-suit may be given against the plaintiff as provided in this title— * * * 3. On motion of the defendant, when the action is called for trial, and the plaintiff fails to appear, or when after the trial has begun, and before the final submission of the cause, the plaintiff abandons it, or when upon the trial the plaintiff fails to prove a cause sufficient to be submitted to the jury."

Under this section of the Code the test is, whether or not the *plaintiff's* evidence tends to prove a cause sufficient to be submitted to a jury; and in passing on this question

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the evidence submitted by the defendant, if any, cannot be considered for any purpose, for the reason that if it is necessary for the defendant to meet the plaintiff's case by evidence, then the case becomes one for the jury and could not be withdrawn from them in this summary manner. This view has been steadily maintained by this court in every case in which the question has arisen. In *Grant v. Baker*, 12 Or. 329, this court said: "To authorize the court to non-suit a plaintiff, the latter must fail to prove a cause sufficient to be submitted to a jury. It must be such a case, that if the jury were to find a verdict for the plaintiff, the court would be required to set it aside for the want of evidence to support it. Civil Code, §§ 243, 244. It would have to be a case where there was a total failure of proof of some material allegation of the complaint." * * * So in *Salmon v. Olds*, 9 Or. 488, it was held that a defendant was not entitled to a non-suit, where, upon the pleadings and evidence introduced, a *prima facie* case has been made out against him.

So also in *Tippin v. Ward*, 5 Or. 454, it was held that a case should be submitted to the jury, unless there is an entire lack of evidence tending to maintain the issues on the part of the plaintiff; or unless upon the whole case made by the plaintiff himself it appears beyond doubt that the plaintiff has no right to recover; and the same principle was applied in *Southwell v. Beezley*, 5 Or. 459.

Prima facie the plaintiff made a case sufficient to be submitted to the jury. He showed the delivery of his property to the defendants for a particular purpose, gave testimony tending to prove its value, a demand on the defendants for its return, and their failure to return it. The jury had the right to pass on this evidence and to say under proper instructions of the court whether or not the plaintiff was entitled to a verdict. He was, unless the effect of this evidence was countervailed in some way by the defendants, and they presented another question proper for the jury to consider. The defendants set up that the property was lost while it was in their custody. Whether the

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defendants had the right to send said property to San Francisco, whether it was lost, and if so was it under such circumstances as would exonerate the defendants from all liability, were all questions presented by the defendants, and they were for the jury under proper instructions by the court.

The learned counsel for the respondents, in support of the practice adopted in the court below, cites *Jansen v. Acker*, 28 Wend. 481; *Rudd v. Davis*, 8 Hill, 287 S. C. 7 Hill, 529; *People v. Cook*, 8 N. Y. 67;¹ *Somer v. Meeker*, 25 N. Y. 361; *Geary v. Simmons*, 39 Cal. 224. These authorities certainly do tend very strongly to support the respondents' contention, but they are at variance with what has already been settled in this court. The particular statutes under which these cases were decided, if any, were not brought to our notice; and if there were no statutes governing such practice, and those cases simply announced the general course of procedure in those States, the cases could not be accepted as controlling authority in this State.

4. Respondents' counsel has criticised the complaint, and doubtless it would have been more in harmony with the spirit of code pleading if it had alleged, amongst other things, the delivery of this property to the defendants, and the object of such delivery, etc., and the defendants' failure to return it; but the defendants have supplied that by an "express aider" in their answer. Bliss Code Pl. § 437. These allegations are contained in the defendants' answer, with the further matter designed to excuse such failure.

These are questions which should have been tried out before that jury, upon the merits of which we indicate no opinion at this time, but reverse the judgment and remand the cause for a new trial.

THAYER, C. J., concurring.—I concur with Judge Strahan in his conclusions in this case regarding the rule of non-suit of a plaintiff under the Code of this State, and as to the sufficiency of the evidence upon the part of the appel-

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lant to establish *prima facie* cause of action against the respondent herein for the conversion of the plans in question. That said plans were delivered to the respondents with the understanding that they should make and furnish to the appellant an estimate of the cost of constructing the machine which the plans represented, was conceded. And the appellant testified that the respondents were to give him an answer regarding the matter within about ten days; but that he had never been able to obtain any such estimate or recover back his plans, although he had called for them and demanded their return a great number of times. This of itself was sufficient to prove a conversion of the plans, unless their detention was satisfactorily accounted for. And it cannot reasonably be claimed that the failure of the respondents to return the plans to the appellant was excused by anything which appeared in the testimony adduced by the latter. The appellant himself testified that one of the respondents, Mr. Parke, told him that he saw the plans in San Francisco, and that he had been looking for them to send them back to appellant, but had missed them, and that they could not be found. He, however, testified in the same connection that when he placed the plans in the hands of the respondents he did not know that they had a house in San Francisco; that he never authorized them to send the plans to San Francisco.

It also appeared from the testimony of Mr. Arthur, manager of the respondent's business at Portland, when on the stand as a witness for the appellant, that he had a vague recollection that the plans were sent to San Francisco either by himself, Mr. Campbell, mechanical engineer for the respondents, or were taken there by Mr. Parke; and upon his cross-examination by respondents' counsel, he testified that the object in sending the plans to San Francisco was simply to get a bid from the home office at what they could manufacture the machine for; that they were endeavoring to secure a price; that the facilities for manufacturing in San Francisco were much better than in Portland; that he continued with respondents at their Port-

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land house until about July 1, 1888, and that during the time he was there the respondents never undertook to make use of these plans or to appropriate them.

The main point in the case is, whether the appellant, by leaving the plans with the respondents at Portland, under the circumstances and for the purpose as testified to by him, authorized the respondents to send them to their home office in San Francisco, for the purpose claimed by them. If the respondents were not so authorized then they were guilty of wrongful conversion of the property, as "any interference subversive of the right of the owner of personal property to enjoy and control it, is a conversion." *Budd v. Multnomah St. Ry. Co. et al.* 12 Or. 271. It was not necessary that the respondents should have made use of the plans for their own benefit or appropriate them to their own personal advantage in order to constitute a conversion. "The question is, did the respondents exercise dominion over them in exclusion or in defiance of the appellant's right." Page 108, vol. 4, Am. & Eng. Ency. of L. The gist of the conversion is the usurpation of the owner's right of property, and not the actual damages inflicted. Note 1, page 113, *id.* Nor is it necessary that the act should be wilful or intentional to render it a conversion. "If a carrier by mistake delivers goods to the wrong person he is liable in trover." Note 1, p. 112, vol. 4. *id.* "Honesty of purpose is not a defense, and can in no measure shield the defendant from liability, except to prevent the giving of punitive damages." Wait's Actions and Defenses, vol. 6, p. 164. "And it makes no difference—in case of bailment—that the depositary did the act for the benefit of the depositor or that it really inured to his benefit. He has no right to use the property for any purpose other than that for which it was left with him, upon any consideration or for any purpose, not even for its preservation." Page 165, *id.* "Any abuse of possession, lawfully acquired, or any breach of the trust under which it was placed in the defendant's hands, is an actionable conversion." Page 166, *id.*

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The appellant, if he testified truthfully,—and for the purposes of this appeal we must presume he did,—delivered the plans in question to the respondents for the specific purpose of obtaining from them certain information which they were to furnish in ten days. That certainly did not authorize the respondents to send the plans to San Francisco, when it would require at least double the specified time to send them there, have the estimate made, and have them returned. It was clearly the duty of the respondents, before sending the appellant's plans out of the State, and exposing them to loss, to have consulted with him in regard to the matter. He had evidently been to great trouble and expense in procuring the plans, and had the same right to exercise control over them that every one has to exercise dominion over that which belongs to him; which right he was deprived of when the plans were sent away without his consent or knowledge.

The respondents doubtless acted in good faith in the affair and intended no wrong, but they seem to have been careless and indifferent, at least they had no intelligent idea as to when, how or by whom the plans were sent away, though the appellant evidently was as constant in calling upon them in regard to the matter as any person having a favorite object in view would be likely to be. He probably became a source of annoyance to the managers of the respondents' business and received very little attention; but he had rights which they were bound to respect, and the workings of his Italian brain, if encouraged, might have produced results important to himself and the community. The respondents, at all events, should not have usurped his right to exercise dominion over his own property and exclude him from its control, which I think they did do, if they sent the plans to San Francisco without his consent. Whether they did so or not, and whether they acted prudently in the affair, are in my opinion proper questions to be submitted to a jury.

LORD, J., dissenting.—The evidence for the plaintiff only shows that the plans “were missed and could not be

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found," or, at most, were mislaid or lost. It does not make out a *prima facie* case of conversion. The argument for the plaintiff proceeded upon the theory that the defendants in sending the plans to their San Francisco house, without the consent of the plaintiff, involved such a misuser of the plans as operated as a conversion of them in law. The contract did not provide where the estimate of costs was to be made, and the defendants sent these plans to their San Francisco house because of its superior facilities to ascertain the cost of constructing the works, which was the object of the contract; but the plaintiff did not know the defendants had a San Francisco house. It is not a case, upon its facts, where a bailee contracts to return the thing bailed at a fixed time, or where time was made the essence of the contract by stipulation, or where, from the nature of the property, or the character of the interest involved, time becomes an essential of the contract; nor where the thing bailed was contracted to be done or to be returned at a particular place or at a particular time without knowing that the defendants had a San Francisco house or any stipulation as to the time when the estimate was to be made, or when the plans were to be returned, other than the law infers were consistent with the purpose of the contract in estimating the cost. The plaintiff left the plans with the defendants for the purpose of ascertaining the cost of constructing a macaroni factory; and to more thoroughly and satisfactorily effect that purpose, the defendants sent their plans to the San Francisco house to make such estimate and return the result to them, where, by some accident, the plans were mislaid or lost, or "were missed and could not be found" when demanded. Do these facts constitute conversion?

At the argument, it was said that if one person hires a horse to drive to one place and he voluntarily drives to another, it is a technical conversion of the horse; and so too it was claimed that when the defendants sent the plans to their San Francisco house to estimate the cost instead of making the estimate at their Portland house, or at least

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without the consent of the plaintiff, that it amounted to a technical conversion of the plans, for which an action in trover could be maintained. This argument assumes more than the facts warrant, for the contract did not stipulate where the estimate of costs was to be made, whether at the Portland or San Francisco house, and could not involve the consent of the plaintiff to any change in that regard; but granting all this, there is no analogy between the cases, for the reason that the horse was bailed for one purpose, and it was used for another which constituted the conversion; while the plans were sent to the San Francisco house not for another but the identical purpose for which they were entrusted to the defendants, namely, to estimate the cost. The use made of the plans by the defendants was not of a different kind from that contemplated by the contract between the parties, but was done in pursuance of its purpose, and to effect the object of its bailment.

To constitute conversion, there must be some act of dominion exerted over one's property in denial of his right, or inconsistent with it. When one hires a horse to drive to one place and he drives it to another, he unlawfully intermeddles with the property of another for his own benefit and appropriates the horse to a use inconsistent with the terms of the bailment. In sending the plans to the San Francisco house, the defendants neither claimed nor exercised any right of property or dominion over them inconsistent with or in denial of the plaintiff's right as the lawful owner, but the conceded facts show that the plans were sent there to better effect the purpose of the bailment and without any intention of appropriating the property to their own use, or to destroy them, or to deprive the plaintiff of them as a rightful owner.

"Conversion," said Field, J., "is based upon the idea of an assumption by the defendant of a right of property, or a right of dominion over the thing converted, which casts upon him all the risks of an owner, and it is therefore not every wrongful intermeddling with, or wrongful

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asportation, or wrongful detention of personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not, in themselves, imply an assertion of title or a right of dominion over such property, will not sustain an action of trover, unless done with the intention to deprive the owner of it temporarily or permanently, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendants in *withholding it, claims the right to withhold it, which is a claim of a right of dominion over it.*" *Spooner v. Manchester*, 133 Mass. 270.

What are the acts which, by any possible construction, can be considered as an assumption by the defendants of a right of property or dominion over the plans, casts upon them the risks of an owner? They claim no right to the plans, nor denied the right of the plaintiff to them; nor did they refuse, on demand, to deliver them, but, by the evidence of the plaintiff, the plans were mislaid and could not be found, or perhaps were lost. It is the withholding of the thing in his possession, or under his control, when demanded, that makes a *prima facie* case of conversion, but not when the evidence shows that at the time of the demand the thing or property was not under his control, or was mislaid or lost. In such case, the property is not withheld, because the defendant claims the right to withhold it, which is a claim of right of dominion over it, but because the property at the time is not under his control and capable of delivery.

The authorities are numerous to the point, that demand and refusal will not be sufficient evidence of conversion, when it appears that the property demanded was not at the time in the possession nor under the control of the defendant on whom the demand was made, but that it had

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been previously lost or stolen or misdelivered. Said Appleton, C. J.: "In trover, a demand and refusal make out a *prima facie* case." But this is rebutted by proof that the property demanded was not at the time of the demand in the defendant's possession, nor under his control. *Boobier v. Boobier*, 39 Me. 407. Trover will not lie against a bailee when the goods have been lost or stolen. *Hawkins v. Hoffman*, 6 Hill, 586. There must be some wrongful act on the part of the defendant. A loss by mere non-feasance will not sustain this form of action. *Bowlin v. Nye*, 10 Cush. 416. Trover cannot be maintained against a common carrier for not delivering goods intrusted to him for transportation, if the goods are not in the carrier's possession at the time of the demand, and have been either lost or stolen. *Packard v. Getman*, 4 Wend. 613. Indeed, there seems an entire concurrence of authorities that in case of a loss of goods by a bailee, or of larceny from him, that he is not liable in trover. *Dearbourn v. National Bank*, 58 Me. 274.

In the case at bar the evidence for the plaintiff is specific to the point that the reason why the plans were not restored to him when demanded, was that they had been mislaid and could not be found, or were lost, and therefore not capable of delivery. The conduct of the defendant may have been negligent or careless, and for which they may be liable in some form of action, but in no legal sense does it constitute acts which imply an assertion of title, or a right of dominion over the property as will sustain an action of trover.

I think the plaintiff failed to establish a case sufficient to be submitted to the jury, and the court committed no error in granting the non-suit.

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[Filed April 21, 1890.]

JOHN HALL, GUARDIAN, APPELLANT, v. G. H. STEVENSON ET AL., RESPONDENTS.

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WRIT OF ATTACHMENT—RETURN—INSUFFICIENT.—A sheriff's return upon a writ of attachment is insufficient which fails to show that a defendant to whom a certified copy of such writ was delivered, was an occupant of the premises sought to be attached, and which failed to show that there was no occupant of said premises, and that a certified copy of the writ posted on the front of defendant's dwelling-house, was posted in a conspicuous place on said premises.

ATTACHMENT—SEPARATE TRACTS.—Several separate and distinct tracts of land cannot be attached by posting a certified copy of the writ in a conspicuous place on one only of such tract.

REMOVAL OF CAUSE—ATTACHMENT—RETURN—AMENDMENT.—Where a sheriff made a defective return on a writ of attachment and the cause was then regularly removed into the circuit court of the United States for the district of Oregon, the State court had no jurisdiction or authority to permit the sheriff to amend his return to said writ. When the cause was removed, the jurisdiction of the State court over it ceased.

MORTGAGE—JUDGMENT LIEN—ORDER IN WHICH LAND TO BE SOLD AND PROCEEDS APPLIED.—Where plaintiff had a first lien by mortgage on the lands of S. and S. G., and C. & W. had a lien by judgment on the lands of S. only; *held*, that the lands of S. & G. should be first sold and the proceeds applied on plaintiff's mortgage, and that S.'s land should then be sold and the proceeds applied to pay anything remaining due on plaintiff's mortgage, and the balance, or so much as might be necessary, be applied to the payment of C. & W.'s judgment, and the residue, if any, be deposited in court for whoever may appear to be entitled to same; and so much of said decree as allowed the sheriff to amend his return on the writ of attachment, must be reversed.

APPEAL from Douglas county: R. S. BEAN, judge.

The plaintiff sues as guardian of Charles and Henry Bingham, and the object of the suit is to foreclose a mortgage made by G. H. Stevenson and wife and F. M. Gabbert and wife, on October 4, 1886, and made to secure the payment of a promissory note for \$2,813.21, and \$125 as reasonable attorney fees.

The defendants Christy & Wise are alleged to have some interest in the mortgaged premises subsequent and subject to the plaintiff's mortgage. The defendants Christy & Wise deny that their claim is subsequent or subject to plaintiff's mortgage and allege that they commenced an action in the circuit court of the State of Oregon for Douglas county against G. H. Stevenson and others, partners doing business under the name of the Grange Business Association of Douglas county, Oregon, to recover the

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sum of \$7,736.80, with attorney fees, interest and costs; that an attachment was duly issued and executed by the sheriff on the fourth day of October, 1886, at 1:30 o'clock P. M., by attaching all the right, title and interest of the defendant G. H. Stevenson in the real property described in the complaint; that said writ was duly returned into court by the sheriff with a certificate of all his doings endorsed thereon; that by said attachment Christy & Wise acquired and now have a valid lien upon defendant Stevenson's interest in said lands; that thereafter said cause was duly removed from the State court to the circuit court of the United States for the district of Oregon; that on the seventeenth day of November, 1887, Christy & Wise recovered a judgment against the defendant Stevenson and others for \$6,565.88, \$500 attorney's fees, and \$518.97 costs, and that said attached property be sold to satisfy said judgment; that on the nineteenth day of November, 1887, this judgment was duly docketed in said circuit court of the United States. There are some other matters alleged in the answer not necessary to be noticed here.

The reply denied the new matter in the answer.

The circuit court heard the cause and took the same under advisement at the May term, 1889, of said court, and the decree was filed with the clerk and entered on the seventeenth day of July, 1889.

The appellant has appealed from certain parts only of said decree, namely, from that part of said decree allowing the sheriff of Douglas county to amend his return on the writ of attachment; from so much of it as directs the order in which the mortgaged premises should be sold, and from so much of it as decides that Christy & Wise's attachment is prior to the plaintiff's mortgage. The other facts are stated in the opinion.

S. B. Linthicum, for Respondents, Christy & Wise.

J. W. Hamilton and *W. R. Willis*, for Appellant.

STRAHAN, J., delivered the opinion of the court.

There are two tracts of land involved in this suit. First, a tract containing 1,553 87.100 acres; second, a tract containing 680 acres. The defendant Stevenson owned an equal undivided one-half of each of these tracts, and Mr. F. M. Gabbert owned the remaining moiety. There is still another tract of about 500 acres described in the complaint which was owned mainly by the defendant Stevenson, though he seems to imply from his evidence that one Lydia Dascomb owned a small undivided interest therein, but that he had bargained for it in some way, the particulars of which do not appear.

The mortgage sought to be foreclosed was executed some time about two or three o'clock P. M. on the fourth day of October, 1886, and after the attachment papers were delivered to the defendant Stevenson. He received these papers from the sheriff in the lane in the southern part of the town of Roseburg. The mortgaged premises were situated about thirteen miles from this point. The individual land of Stevenson joins the 1,500-acre tract owned in common with Gabbert, and the distance between the 640-acre tract and the 1,500-acre tract is about one-fourth of a mile.

The sheriff by his return on the writ of attachment certifies as follows: "And I further certify that I did, on the said fourth day of October, 1886, by virtue of said annexed writ of attachment above described, attach the following described real property of George Stevenson, one of the defendants named in said annexed writ of attachment, subject to the former attachment of Koshland Bros., hereinbefore mentioned. I did, in pursuance of said annexed writ of attachment, on the said fourth day of October, 1886, at 8:30 A. M. of said day, attach the following described real property by delivering to said George Stevenson in person a copy of the annexed writ of attachment, duly certified to by me as sheriff aforesaid, and thereafter, to wit, at 1:30 o'clock P. M. of said fourth day

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of October, 1886, I duly posted a copy of said annexed writ of attachment, duly certified to by me as sheriff, upon the front of the dwelling-house of said George Stevenson, within said county and State, as no person could be found at the place of residence of said defendant George Stevenson of suitable age and discretion with whom to leave said copy of said writ of attachment, as aforesaid."

No other fact appears in the return showing the manner of service. On the ninth day of October, 1886, the sheriff made out a certificate certifying, in effect, that he had attached all the real property described in the complaint as the property of the defendant Geo. H. Stevenson, which certificate was filed with the county clerk on that day and by him recorded.

The only questions we deem necessary to consider are whether the return was sufficient to show the property in controversy had been attached; or, if the same be deemed insufficient, whether the attempted amendment thereof in this case can be sustained.

1. Section 149, Hill's Code, provides: "The sheriff to whom the writ is directed and delivered shall execute the same without delay as follows: 1. Real property shall be attached, by leaving with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the writ certified by the sheriff."

The return of the sheriff fails to show that George H. Stevenson was an occupant of the premises sought to be attached, and it does not appear that the copy of the writ was posted in a conspicuous place on said premises. The sheriff returns that it was posted "upon the front of the dwelling-house of said Geo. H. Stevenson within said county and State," but it does not appear that said dwelling-house was the property sought to be attached or that the front of said dwelling-house was "a conspicuous place."

The sufficiency of a return much like this came before the circuit court of the United States for this State in *Mickey v. Stratton*, 5 Saw. 475, and was held insufficient. The learned and distinguished judge of said court, after

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citing *Trullinger v. Todd*, 5 Or. 39, said: "Now the analogy between these cases and the one at bar is complete. The service of an attachment, in case of real property, is required to be made by leaving a copy of the writ with the occupant thereof, but if there be no occupant, then, and in that case only, by leaving a copy in a conspicuous place thereon. The law is framed on the reasonable assumption that the occupant represents the absent owner, and therefore it requires the service to be made upon him; and no substituted service, by leaving a copy of the writ on the premises, is permissible unless there is no one in the occupation of the premises upon whom service can be made, and that fact appears from the return, or else the service upon its face is unauthorized and invalid. Further, the return must state what was done, and the presumption that an officer has done his duty is not sufficient to supply a material fact or circumstance which does not appear in his return. For the law having made it his duty to endorse his proceedings under the writ thereon, the presumption that he did his duty applies as well to the making of the return as the service of the writ, and therefore there is no room to presume that he did his duty in making the service more fully or otherwise, than he has stated in his return."

If this is the correct construction of the statute, and there is no reason to doubt it, it is decisive of this question. But there are other authorities to the same effect. *Bryan v. Trout*, 90 Penn. St. 492; *Page v. Generes*, 6 La. Ann. 549; *Ezelle v. Simpson*, 42 Miss. 515; *Tucker v. Byars*, 46 Miss. 549.

It was also argued that if the court should be of the opinion that this return was sufficient to make a valid attachment of Stevenson's individual land, it was not good as to those tracts in which he owned only an undivided interest and particularly the tract that did not join the others or have any connection whatever therewith, and this contention of the appellant I think would have to be sustained, but its consideration is unnecessary. Several separate and distinct parcels of land could not be attached

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by posting up a copy of the writ on one only of them. *Henry v. Mitchell*, 32 Mo. 512.

The sheriff's return was therefore insufficient to show that the lands in controversy had been attached at the suit of Christy & Wise.

2. The remaining question is, was such return amendable and were the proper proceedings taken in the court below to amend the same? If the cause in which the defective return was made had not been removed into the circuit court of the United States for the District of Oregon, and the rights of other parties had not intervened, then, if the facts existed which would have enabled the sheriff to make a good return on the writ of attachment, the court might have permitted him to do so. But by what authority did the circuit court of Douglas county proceed to amend a process in a cause which had been lawfully removed into the Federal courts?

"If the record discloses a removable cause, and the other conditions have been complied with, the jurisdiction of the State court ceases, and that of the Federal court attaches without any further proceedings and for all subsequent purposes." *Dillon's Removal of Causes*, § 77b.

The power of the State court had, therefore, ceased over the case of *Christy & Wise v. G. H. Stevenson et al.* long before this attempted amendment of this return in that case, and the court had no power whatever over said cause or any process issued therein. After the removal it belonged to the Federal court to exercise the power of amendment if it thought proper to do so to the same extent and as fully as if said cause had been originally commenced in that court.

This view of the subject renders it unnecessary to discuss the question whether as against these plaintiffs the return was amendable, and whether or not the order of amendment could be made in this case; but I think proper to add that the mode of procuring an amendment of process or return is generally to proceed upon notice in the cause where such defect occurs.

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3. One other question remains to be considered, and that is the order in which the mortgaged premises shall be sold. Christy & Wise have a judgment which, so far as appears, is a second lien on Stevenson's land and upon the undivided half of the tracts which he holds as tenant in common with Gabbert, and they have no lien on Gabbert's interest therein. In such case it is equitable that the lands upon which Christy & Wise have no lien should be first sold, and the proceeds arising therefrom be applied to the payment of the plaintiff's mortgage, interest and costs, and the residue of the proceeds of Stevenson's interest, if any, be applied upon the judgment of Christy & Wise, and that the remainder of said real estate be also sold, and the proceeds be applied—first, to the payment of any balance that may be due the plaintiff on said mortgage, if any, and the residue to the payment of the judgment of Christy & Wise, mentioned in the pleadings, and the remainder, if any, be deposited in the circuit court of Douglas county to be paid out to whoever may be entitled to receive the same, and that the mortgage described in the complaint be foreclosed, etc.

The decree of the court below will be modified as herein indicated.

[Filed April 23, 1890.]

THE STATE OF OREGON EX REL. E. HARDY,
RESPONDENTS, v. JAMES GLEASON, APPELLANT.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATION.—In proceedings supplementary to execution, where an attorney for the defendant is called as a witness and testifies that he had in his possession, after the commencement of the action, money, notes, checks, evidence of indebtedness, or other property of the defendant, he may be required to state what he had in his possession and what he did with such property or effects. The facts required to answer these questions are not privileged communications, made in the course of professional employment.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

One Edwin Hardy obtained a judgment for about \$5,000 against Bigné and Watson, and being unable to obtain satisfaction of an execution issued on said judgment, insti-

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tuted proceeding supplementary to execution. In the course of an examination had before a referee appointed for that purpose, Bigné was called as a witness and testified, among other things, that he had received from the estate of one Manciet, on July 12, 1889, the sum of \$10,478.52 and failed to give any satisfactory account as to what had become of it.

The appellant was present at the hearing as counsel for Bigné and, upon the examination of the latter being concluded, was called and sworn as a witness. In the course of his examination he was asked to state if he had had, at any time subsequent to February 13, 1889 (the date of the commencement of this action), any money, check, certificate of deposit, promissory note, or other evidence of indebtedness, or other property whatever belonging to Bigné in his possession or under his control; and under the order of the court made upon his objection, he answered "Yes." He was then asked to state what he did have, and declined to respond on the ground that the matter was confidential between himself and his client and he was privileged from such examination.

The referee, conceiving that he had no power to rule upon the legal point here raised, referred the matter to the court, and the witness was directed to respond to the question, and state what disposition he had made of such property as had been in his possession. Thereupon the examination was resumed and the witness was asked the question, "Just state what you did have," to which he responded, "I decline to answer the question on the ground that the relationship which existed between Mr. Bigné and myself was that of attorney and client, and all my knowledge with reference to his property came in the course of professional employment between Bigné and myself, and I claim the privilege of an attorney in these matters. It is a privileged communication between an attorney and client, and I decline to answer, not from a desire to be contumacious before the court, but I insist upon my rights and decline to answer."

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On a subsequent day of the examination the witness was asked the following question: "Without in any manner waiving my right to require an answer to the last interrogatory asked you on the twenty-eighth day of March, I will now ask you to state what disposition you made of such money, checks, certificate of deposit, promissory note, or other evidence of indebtedness, or other property whatsoever belonging to defendant Bigné which was in your possession or under your control at any time subsequent to the thirteenth day of February, 1889?" To which the witness responded: "I decline to answer the question for the reason that if I were to do so I would have to disclose the communications made by Mr. Bigné to me in a professional capacity while he was my client and I was acting as his attorney; and I claim the right to hold as privileged the communications made by him to me in reference to his affairs and the disposition of any funds of his made to me by him as his attorney and as my client, because they were of a confidential character. I refuse to answer the question for those reasons."

These matters having been shown to the satisfaction of the lower court by affidavit, the appellant was brought before the court upon an order to show cause why he should not be punished for contempt in refusing to answer the interrogatories. He there filed an answer to the statements contained in the affidavit, substantially reiterating the objections he had previously made.

The respondents demurred to this answer on the ground of its insufficiency to constitute a defense, and the demurrer was sustained, whereupon judgment was entered committing the appellant until he should submit to answer, and awarding to the respondents costs of the proceedings. It is from this judgment that the present appeal is taken.

C. H. Carey, for Appellant.

L. B. Cox, for Respondent.

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STRAHAN, J., delivered the opinion of the court.

The only question presented by this record for our consideration is, whether or not the defendant was bound to answer the questions propounded to him on his examination; in other words, whether his relation to Bigné as his attorney excused him from answering.

1. Section 712, Hill's Code, provides: "There are particular relations in which it is the policy of the law to encourage confidence, and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: * * * 2. An attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment"; and by subdivision 5 of section 1038, Hill's Code, it is made the duty of an attorney to maintain inviolate the confidence, and at every peril to himself to preserve the secrets of his clients. But these provisions introduce no new principle into the law. They are simply declaratory of the common law.

The defendant having answered that subsequent to February 13, 1889, he did have in his possession or under his control, money, check, certificate of deposit, promissory note, or other evidence of indebtedness, or other property belonging to the defendant Bigné, it was competent for the plaintiff to ask him what he did have and what disposition he made of the same. The facts necessary to make proper answers to these questions were not privileged. The authorities are very full and direct on this question and their citation is decisive of the case against the appellant. *Jeans v. Fridenberg*, 3 Penn. L. J. Rep. 65; *Williams v. Young*, 46 Iowa, 140; *Andrews v. O. & M. R. R. Co.*, 14 Ind. 169; *Brandt v. Kien*, 17 Johns. 335; *in re Bliss*, 386-38 How. Pr. 79; *Rundle v. Foster*, 3 Tenn. Ch. 658; *Graham v. O'Fallon*, 4 Mo. 338; *Hager v. Schindler*, 29 Cal. 48; *Duffin v. Smith Peakes*, N. P. cases, 108; *Dudley v. Beck*, 3 Wis. 274; *People ex rel. Mitchell v. The Sheriff of N. Y.*, 29 Barb. 622; *Fulton v. Maccracken*, 18 Md. 229.

PER CURIAM.

The appellant's counsel has presented a carefully-prepared brief and has cited numerous authorities in support of his contention; but they only refer to various applications of the same rule already mentioned, and I deem it unnecessary to refer to those authorities more particularly. They in no manner conflict with the principles already stated.

It follows that there was no error in the judgment appealed from and it must be affirmed

[Filed April 22, 1890.]

M. FISK, RESPONDENT, v. THE N. P. R. R. CO., APPELLANT.

APPEAL from Columbia county: F. J. TAYLOR, judge.

Dolph, Bellinger, Mallory & Simon, for Appellant.

R. & E. B. Williams and *Sears & Beach*, for Respondent.

Moses v. S.P.R. R. Co., 18 Or. 385, approved and followed.

PER CURIAM.—The court below held in this case that the railway company was required under the statute to fence its depot.

In a recent case—*Moses v. S. P. R. R. Co.*, 18 Or. 385,—we held otherwise, and the reasons therein stated render it unnecessary to further consider that question.

The judgment must be reversed and a new trial ordered.

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[Filed May 1, 1890.]

H. C. LEWIS, APPELLANT, v. J. C. BIRDSEY AND W. G. COOPER, RESPONDENTS.

REPLEVIN—WHAT TITLE SUFFICIENT TO SUSTAIN IT.—In an action to recover the possession of personal property, the plaintiff ordinarily must show that he is the owner of the property, or is lawfully entitled to the possession of it by virtue of a special property therein. The ownership, however, requisite to maintain such an action need not be absolute; a right to the possession and dominion over it for the time is all that is essential.

REPLEVIN—POSSESSION—EFFECT OF—TAKING BY THIRD PERSON.—Hence where one person is in possession of personal property exercising dominion over it, and another takes and carries it away without his consent, the former may maintain an action against the latter to recover the possession of the property although in fact it belongs to a third person, unless the latter can justify his taking of the property by showing such a privity existing between him and the owner as would entitle him to represent the owner's interest in it.

ATTACHMENT—PERSONAL PROPERTY IN THE HANDS OF A THIRD PERSON.—A sheriff, in the execution of a writ of attachment, is not authorized to take personal property into his custody where it is in the possession of a third person; in such case he can only attach the property by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same.

PERSONAL PROPERTY—SALE OF—CONCURRENT ACTS—ATTACHMENT—LEVY.—Where a plaintiff owned a band of cattle, a part of which he agreed to trade to one G. in consideration that G. would convey to him a half interest in a certain lot of land in the town of C. P., and would also assign to him certain policies of insurance upon the buildings situated on the lot, and the plaintiff took the cattle to be traded to C. P. and left them there to remain a certain length of time, when he would return and consummate the trade; and the plaintiff returned at the expiration of the time, but ascertaining that G. had not assigned to him the policies of insurance, as agreed, took the cattle and sent them back to the pasture where he was keeping the band from which he had taken them, and subsequently the sheriff, under a writ of attachment in an action wherein one C. was plaintiff and said G. was defendant, in attempting to attach the cattle so agreed to be traded as the property of G., seized and took into his custody against the protest of the plaintiff a number of cattle which he selected from the band without knowing whether or not they were the cattle agreed to be traded; held, that the attempted levy was a nullity; and that the plaintiff had such an ownership in the cattle, even if he had made a bill of sale of them to G. and the latter had conveyed to him the interest in the said lot, but had failed to assign to him the policies of insurance, as would entitle him to maintain an action against the sheriff to recover the possession of the cattle seized.

APPEAL from Jackson county: L. R. WEBSTER, judge.

The appellant commenced an action in the said circuit court against the respondent Birdsey to recover the possession of certain personal property, consisting of eight head of thoroughbred cattle, claimed to be of the value of \$2,700. He alleged in his complaint that on the twenty-seventh day of September, 1889, and prior thereto, in the said county of Jackson, he was the owner and in the law-

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ful possession of and entitled to the lawful possession of said cattle; that on the said twenty-third day of September, in said county, the said respondent, without the consent of appellant, wrongfully took and seized the possession of and then wrongfully detained the same. He also alleged a demand of the possession of the cattle prior to the commencement of the action, and a wrongful withholding on the part of said respondent to appellant's damage in the sum of \$2,050, and also alleged certain facts as special damages amounting to \$1,000.

The said respondent filed an answer denying that the appellant was the owner of or entitled to the possession of the cattle, also the alleged value of them. He denied the wrongful taking, seizure or detention of the cattle, also the wrongful withholding possession of them, and the damage claimed on account thereof. Said respondent for a further defense alleged that he was, during the times mentioned in the complaint, the sheriff of said county of Jackson; that on said twenty-third day of September, 1889, an action at law was pending in the said circuit court wherein W. G. Cooper was plaintiff and one Wm. Gates was defendant; that at said last-mentioned time a writ of attachment duly issued in said action directing the attachment of the property of said Gates, or enough thereof to satisfy \$503, which said writ was thereafter delivered to the said respondent as such sheriff, and that by virtue thereof he levied upon and took into his possession the said cattle; that said action was still pending undetermined, and that under said writ and levy said respondent was retaining possession of them. Said respondent also alleged that he was informed and believed, and upon such information and belief alleged, that said Wm. Gates was and had been the owner of and seized and possessed of the said cattle. The said respondent also, as another defense, alleged certain matters as an estoppel against the appellant from claiming ownership of the cattle.

The appellant filed a reply to the new matter of defense set forth in said answer, denying the same.

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Thereupon the respondent, said W. G. Cooper, filed a motion to be made a party defendant in the said action, which was granted by the said circuit court. Said Cooper then filed an answer to the said complaint, similar in terms to that filed by the said Birdsey, and the appellant filed a reply to the new matter contained therein denying the same.

The case was tried by jury, who returned a verdict in favor of the respondents, upon which the judgment appealed from was entered

P. P. Prim, R. Williams and O. W. Kahler, for Appellant.

H. K. Hanna and Francis Fitch, for Respondents.

THAYER, C. J., delivered the opinion of the court

The issues in this case involve the right of the appellant to the possession of the cattle mentioned in the complaint as against the respondents. The latter claimed the right to the possession of the cattle under the attachment proceedings, referred to in the answer to the complaint. The grounds of error relied upon by the appellant consist entirely of exceptions taken to instructions given by the court to the jury, and to the refusal of the court to give certain instructions as requested by the appellant's counsel.

It appears from the bill of exceptions contained in the record, that the appellant gave evidence at the trial of the action showing that he was the owner of twenty-three head of full-blooded Galloway cattle; that he was keeping them in a Mr. Bybee's pasture in said county of Jackson; that he had been keeping them there four or five weeks prior to the time of the alleged taking by the respondent Birdsey mentioned in the complaint; that a short time before said taking, he took out from the pasture seven head of the twenty-three head of cattle and drove them over to Central Point and turned them over to Wm. Gates and Mr. Fenton to take in; that he gave Mr. Fenton charge of the cattle, and told him to keep them until he came in

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Sunday morning; that this was on the fourteenth or fifteenth of September, 1889; that he took the seven head of cattle over to Central Point to trade with Mrs. Gates for an undivided half interest she owned in lot 11, block 11, town of Central Point; that he was to give her the cattle for her half interest in the lot, and she was to assign to him her interest in the insurance policies on the buildings situated thereon; that the cattle were not delivered to Mrs. Gates because he did not come back until Monday morning and she had left the Sunday evening before, and had not assigned to him the insurance policies; that he then took charge of the cattle and had them sent back to the pasture with the others; but on the following Monday Birdsey, as sheriff, took the eight head of cattle in controversy, which were a part of the said twenty-three head, under the attachment in favor of Cooper and against Wm. Gates.

It also appears from the bill of exceptions that when the said sheriff went to levy the attachment upon the cattle, the appellant notified him that they belonged to him—appellant—and forbade his taking them; and that the sheriff not being able to identify the said seven head taken over to Central Point, those which he intended to levy upon, he employed one Edward McDonald to go with him and pick them out; that they took out eight head, including a suckling calf, but did not know whether they were the same animals which had been taken to Central Point and driven back.

It further appears from the bill of exceptions that the respondent W. G. Cooper was called as a witness, who testified that he had had conversations with the appellant in regard to the cattle; that he asked him about the black cattle,—if he had not traded Gates some black cattle; that appellant said “yes.” Witness asked where they were. Appellant said “out at Bybee’s pasture.” That he traded them for real estate; gave Gates a bill of sale of the cattle. Witness asked him why the cattle did not belong to Gates. Appellant said they *were* Gates’. Witness asked him why

they were not at Gates' now; that appellant said: "They agreed to assign over these fire insurance policies, and when I came in Monday morning I found they hadn't done it, and I took the cattle right straight back home."

The honorable judge of the court, in signing the said bill of exceptions, appended to it the following certificate: "The above bill of exceptions is hereby allowed; the evidence above set out is not all the evidence in the case, but there was other and additional evidence upon all the points mentioned in the evidence as here set out."

The instructions of the court to the jury are too voluminous to be considered *seriatim*, and I shall not attempt it; but shall content myself by referring to some rules of law which bear upon the questions involved. The case was a very simple one to determine. The appellant was clearly entitled to the possession of the cattle unless they belonged to Wm. Gates at the time they were taken by the respondents. If the appellant had agreed to sell the cattle to Mrs. Gates, or to Wm. Gates, for that matter, and the latter had not performed the conditions upon which the sale and delivery were agreed to be made, the vendee would not have been entitled to the possession of the cattle, nor the sheriff to take them under the attachment proceeding. Neither was the sheriff entitled to take the cattle from the appellant by virtue of the writ of attachment so long as the latter had them in his possession, claiming to be their owner. The case of *Spaulding v. Kennedy*, 6 Or. 208, is decisive upon that point. Nor was the appellant required to prove general ownership of the property, in order to entitle him to a recovery of the possession thereof. If he had a right to the possession of it as against the respondents it was sufficient.

In *Sprague & Carr, Admr., v. Clark*, 41 Vt. 10, the supreme court of that State, in construing a statute upon the subject of replevin, use this language: "Under this statute, any person who is entitled to the possession of any goods, or chattels, may maintain replevin against any person who unlawfully takes or detains such goods or chattels from

him. To entitle him to the possession, it is not necessary that he should be the owner, or that he should be entitled to possession as against all others. It is sufficient if he is entitled to the possession as against the person who takes it from him. In such case, the taking of it from him is an unlawful taking. A person who is in the possession, claiming the property or an interest in it, or a legal right to the possession, may maintain replevin against any person taking the property from him, who cannot show a better right to it. The defendant in the action of replevin, can prevail only when it appears that he is entitled to a return of the property, and that can be only when it appears that his right is superior to that of the plaintiff. The question is to be determined according to the respective rights of the parties to the suit."

This decision, though made under a statute, is, I think, a fair exposition of the general rule of law upon the subject.

The supreme court of New York, in *Rogers v. Arnold*, 12 Wend. 31, by Nelson, J., says: "It has long been settled in this State that the possession of personal chattels by the plaintiff, and an actual wrongful taking by the defendant, are sufficient to support replevin, and that it may be brought where trespass *de bonis asportatis* will lie." Citing several of the earlier cases.

The Civil Code of this State does not provide when a person may maintain replevin; but it does provide that in an action to recover the possession of personal property, the plaintiff may claim an immediate delivery thereof, when he is the owner of the property, or is lawfully entitled to the possession of it by virtue of a special property therein; from which it may be inferred that at least such an interest in personal property will entitle the plaintiff to recover the possession of it in the action when it is wrongfully detained from him.

In *Johnson v. Curnley*, 10 N. Y. 570,¹ the court of appeals held that an actual possession of the property by the plaintiff, coupled with an equitable interest therein at the

(1) 51 Am. Dec. 762.

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time of the seizure by the sheriff, was sufficient to maintain the action, and to entitle the plaintiff to a return of the property, although the general property and right of immediate possession be at the same time in a stranger, the defendant showing no privity between himself and such stranger. This I am inclined to believe is the true rule upon the subject.

The lawful possession of personal property is a sufficient title, in my opinion, to entitle the possessor to recover it against one who has taken it without right. This view is sustained by the language of Justice Nelson in *Rogers v. Arnold*, *supra*, at page 85, as follows: "When we speak of property in the plaintiff, or in the defendant in this action, it is material to understand what is meant by the term. From the language used in some of the books, it might be inferred that the question between the parties involved the *absolute ownership of it*. The cases already referred to showing under what circumstances this action will lie, negative this idea. Right to the possession and dominion of the goods and chattels for the time is all that is essential. This is the view which this court had of the question at an early day (1 John's R. 380.) It is conceded by the learned judge who delivered the opinion in that case that an interest of the plaintiff in the property which would have sustained trespass or replevin would have constituted a good replication to the plea of property in strangers."

It would be a remarkable doctrine, indeed, if one person could invade the possessions of another, take and carry away without authority goods and chattels he was claiming and exercising dominion over, and defeat his recovering them back by a plea that some stranger owned them. The respondents in this case could gain no standing in court, to question the appellant's ownership of the cattle without first showing that Wm. Gates owned them and that the writ of attachment was duly levied upon them. A defendant in such a case, in order to justify the taking of property claimed by the plaintiff, must show not only that it belonged to a third person, but that there was such

a privity between him and the third person as entitled him to represent the latter in the ownership of the property. Nor does the evidence in the case, as shown by the bill of exceptions, estop the appellant from claiming the cattle. If he told the respondent Cooper everything testified to by the latter; and even more, if he had told him that he had sold the cattle to Gates in consideration of the half interest in the lot and the assignment of the policies of insurance, that he had executed a bill of sale of the cattle and received a deed for the property, but that the policies of insurance had not been delivered to him and he refused to deliver the cattle until they were, it would not have constituted an estoppel.

The appellant had an undoubted right, as before suggested, to hold the cattle until the agreement upon the part of the Gates family was fully performed.

A party cannot be compelled to deliver property upon a sale thereof, when delivery and payment are to be simultaneous, until the vendee has fully performed the terms of the agreement on his part; until then, the vendor has a lien upon the property, amounting to a special property in it and is entitled to hold it as against every one.

The theory upon which this case was tried in the circuit court, as indicated by the instructions given to the jury, and the refusal of the court to give instructions requested by appellant's counsel, which were excepted to, is clearly in conflict with the views herein expressed.

The judgment appealed from will, therefore, be reversed and the case remanded to the said circuit court for a new trial in accordance with the principles of the foregoing opinion.

Statement of facts.

[Filed May 1, 1890.]

E. L. SCHEIFFELIN AND FANNIE SCHEIFFELIN,
 APPELLANTS, v. WILLIAM L. WEATHERED,
 RESPONDENT.

CROSS-BILL—WHEN PERMITTED.—A defendant in an action at law has no right to file a complaint in equity, in the nature of a cross-bill, unless the complaint shows that he "is entitled to relief, arising out of facts requiring the interposition of a court of equity and material for his defense"; and where it appeared from the complaint filed in such a case that the facts alleged, if true, would be available as a defense in the action at law; *held*, that a general demurrer to the complaint was properly sustained.

APPEAL—WHEN IT LIES FROM DECREE DISMISSING CROSS-BILL.—*Held*, also, that a decree dismissing such a complaint after a demurrer to it had been sustained and the plaintiff had not answered over, was a final decision from which an appeal would lie to the supreme court.

APPEAL from Washington county: F. J. Taylor, judge.

The respondent commenced an action at law in the said circuit court against the appellants upon two promissory notes executed by them to the respondent and bearing date February 14, 1887, one of which was due in six months, and the other eighteen months from date; each bearing interest at the rate of ten per cent per annum; and upon which he claimed to be due the principal sum and interest, and the sum of \$110 attorney fees.

The appellants filed an answer to the said complaint denying the amount claimed to be due upon the notes as claimed therein; denied that the sum of \$110 was a reasonable attorney fee therein; denied that no part of the said notes had been paid; but alleged that the appellant E. L. Scheiffelin had paid the respondent \$100, of which \$31 was to be applied upon account, and that the balance, \$69, was to be credited upon the notes; also the sum of \$42. The said appellants, for a further answer, alleged that on the fifteenth day of November, 1886, the respondent was associated with one C. W. Ransom in the drug business; that said Ransom owned an undivided interest in a large number of accounts and notes of the probable value of \$2,000, which were due and to become due to said Ransom and respondent; that on said fifteenth day of November, 1886, the said E. L. Scheiffelin, with the knowledge of respon-

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dent, purchased of said Ransom his undivided half interest in said accounts and notes, and at the time of the execution of the notes in suit it was agreed between respondent and said Scheiffelin that the former was to retain possession of said accounts and notes, collect the same and apply the one-half so collected as credits upon the notes in suit; that he had collected thereon divers large sums, the amount of which was unknown to appellants, but he had failed to credit the same as agreed, and the appellants set out in the answer a long list of the names of persons and amounts which the respondent had collected from each.

The appellants further alleged that they had requested from respondent an accounting and settlement of the matter, but that he had neglected to render any account whatever thereof. And they further alleged that the crediting of the notes in suit, with one-half of all the sums collected by respondent upon said accounts and notes, and with the sums paid thereon, the same would be almost if not fully paid and discharged; that they had always been willing to pay respondent any balance that might be found due him upon an accounting between them; and they demanded as relief that the action be stayed and the respondent be compelled to account to appellants for all sums collected by him upon the said accounts and notes.

The respondent filed a reply to the said answer denying the new matter therein alleged; whereupon the appellants filed a cross complaint in equity, in which they alleged the purchase from the respondent of his stock in trade, consisting of all the goods, drugs and fixtures in a certain drug-store, which was the consideration for the two promissory notes sued upon in the action at law, also another note executed by them to respondent and which they had since taken up. They further alleged in the cross-complaint that the said respondent falsely represented to them that he had invoiced said stock of goods and that the invoice price or value thereof was \$1,400, which he knew to be false, and that it did not exceed \$800; that they were

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induced to purchase the same through said false representation.

Said appellants further allege, substantially, the said matters set forth in their answer to the complaint in the action at law, and demand that the respondent be compelled to account for all of said matters, and that the said notes sued upon be surrendered up.

The respondent filed a demurrer to the said cross-complaint, demurring to certain portions thereof, and to the whole of the same, upon the grounds that the allegations contained therein did not constitute a cause of suit.

The circuit court sustained the demurrer and decreed that the said complaint be dismissed; which is the decree appealed from herein.

Thos. H. Tongue, for Respondent.

S. B. Huston, for Appellant.

THAYER, C. J., delivered the opinion of the court.

The respondent's counsel insisted at the hearing that the appeal herein would not lie; that the cross-complaint was merely auxilliary to the defense in the action at law, and that the decision upon the demurrer was only interlocutory; but it will be observed from an inspection of the language of the Code upon the subject that the filing of a complaint in the nature of a cross-bill stays the proceedings at law and the case therefore proceeds as a suit in equity. The suit in such a case is really as independent of the action at law as though it were commenced by original summons. The object of the provisions of the Code regulating the proceeding was to avoid the necessity of waiting until the action at law was determined before equity jurisdiction was invoked; and it saved the necessity of procuring the issuance of an injunction to restrain the execution of the judgment at law. But whether the complaint contains facts sufficient to entitle the appellants to the relief claimed is a much more difficult question to solve in their favor. The Code provides that in an action at law, where the de-

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fendant is entitled to relief, arising out of facts requiring the interposition of a court of equity, and material for his defense, he may, upon filing his answer therein also as plaintiff file a complaint in equity, etc. Unless, therefore, the relief sought does arise out of facts requiring the interposition of a court of equity, and material to the defense, the defendant is not entitled to file such complaint.

I was strongly impressed at the hearing with the belief that the appellants had not shown in their complaint such a state of facts as required the aid of a court of equity to render them available as a defense to the action upon the notes, and a further consideration of the case has confirmed me in that belief.

The matter of the alleged fraudulent representations claimed to have been made by the respondent to the appellants upon the sale by him to them of the drugs and other articles for the payment of which the notes were executed, and the matter of the alleged partial payments upon the said notes, are matters clearly cognizable at law, and the appellants are entitled to the benefit of them as a defense in said action. Partial payments upon a note may, under the Code, be pleaded as payment *pro tanto* thereof. And a fraud or warranty in the sale of goods could, before the Code, be set up as a recoupment of the plaintiff's claim in an action to recover the consideration price of the goods; and since then may be interposed as a defense by way of counter-claim, notwithstanding a promissory note was given for such price, where it had not been transferred to an innocent holder. Nor do I see any difficulty in the appellants availing themselves of the matter of the alleged agreement of the respondent to collect the said accounts and notes belonging to him and said E. L. Scheiffelin and to apply one-half of the amounts collected as credits upon the notes sued upon, as a defense to the action upon said notes.

The appellants' counsel contended that it was necessary that the appellants have the aid of a court of equity in that matter in order to obtain a discovery; but that is no longer

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an essential ground of equitable jurisdiction, although courts of equity may still retain jurisdiction for such purpose. The provisions of the Code are sufficiently broad to admit of as full a discovery at law in such a case as can be obtained in a court of equity.

The appellants do not, in my opinion, show by their complaint a case requiring the interposition of a court of equity, and material for their defense in the action at law.

The circuit court, therefore, properly sustained the demurrer, and the decree appealed from will be affirmed.

[Filed April 1, 1890.]

STATE OF OREGON, RESPONDENT, v. GEORGE CHASTAIN, APPELLANT.

SPIRITUOUS LIQUORS—SALE BY AGENT.—Where one sells spirituous liquors as the agent of another, neither he nor his principal having any license, under the statute he is liable personally to an indictment.

STATUTES IN NATURE OF POLICE REGULATIONS.—Statutes prohibiting the sale of liquors without first having obtained a license therefor, are in the nature of fiscal and police regulations, and make their violation indictable irrespective of guilty knowledge.

APPEAL from Klamath county: L. R. Webster, judge.

The defendant was jointly indicted with one D. A. Scott under a charge of selling spirituous liquors without a license. There was a failure in arresting Scott, and defendant went to separate trial and was convicted. On the trial the defendant sought to introduce substantially the following facts as a defense to the indictment: That one D. A. Scott, the co-defendant in this indictment, about the first day of October, 1889, opened a saloon for sale of spirituous liquors at Bonanza, a small village in Klamath county, Oregon, situated about twenty miles from Linkville, the county seat; that shortly after opening said business, the said Scott represented to defendant and other residents of the village that he had deposited with the treasurer of said county the money for his license, in accordance with the custom of parties desir-

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ing a license, and that he must go to Linkville and get it; that Scott at this time had a United States revenue license for the sale of liquors, and that after making these representations Scott hired the defendant to tend bar for him until he could go and get his license and return, which would be in a few days. Scott left with the avowed purpose of getting his license, but never returned. Soon after Scott left, his creditors attached his property and closed his business, but that during the interval between his leaving and closing the business, the defendant sold the liquor to the witness Truitt; that the defendant had no interest whatever in the business or its receipts, and honestly believed that Scott had taken out his license before the delivery of the whisky to the witness Truitt.

These facts were sought to be shown by several witnesses; but on objection, the court refused to admit the evidence, and in effect instructed the jury that such facts would not constitute a defense for selling liquor without a license.

H. K. Hanna, for Appellant.

Wm. M. Colvig, district attorney, for State.

LORD, J., delivered the opinion of the court.

On behalf of the defendant, it is contended that as he was simply a servant or employé of Scott and had no interest in the business or the result of the sales of liquor, and honestly believed his employer had procured a license, and was mislead by him; that he could have no motive or intention to violate the law, without which his act could not constitute a criminal offense. The contention, therefore, is, that to make a transaction criminal, there must be both the will and act entering into the transaction.

That "the wrongful intent being the essence of every crime, the doctrine necessarily follows, that whenever a man is misled without his own fault or carelessness, concerning facts; and while so misled, acts as he would be justified in doing were the facts what he believed them to be, he is legally innocent, the same as he is innocent morally." Bishop Crim. Law, § 303.

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"The doctrine which requires the existence of evil intent lies at the foundation of public justice. There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal." *Idem*, § 287. Thus in *Fauks v. People*, 39 Mich. 200, where, on a prosecution for selling intoxicating liquors to a minor, it was held a good defense to show that the seller reasonably believed him of age. Campbell, C. J., said: "It cannot be assumed that the legislature would attempt such a wrong as to punish a criminal act which involved no criminal intent. This principle is as old as the criminal law and underlies the whole of it."

As illustrative of the principle involved, see also *Farrell v. State*, 32 Ohio State, 456; 3 Law. Crim. Def. 200, 267, 279; 11 Am. & Eng. Ency of Law ("Intoxicating Liquors"), pages 694, 698.

On the other hand, in other jurisdictions, upon the question whether the seller knew that the buyer was a minor, it has been held that ignorance in this particular, joined with an honest belief that the minor was of full age, is no defense. In *Ulrich v. Com.*, 6 Bush. 400, it was held that it is as incumbent on the vender of liquors to know that his customer labors under no disability as it is for him to know the law, and that his ignorance of neither will excuse him.

In *McCatchoon v. People*, 69 Ill. 606, Scott, J., said: "The license procured under the first section of the act confers no authority on the licensee to sell intoxicating liquors to a minor, except on one condition, viz.: he shall have the written order of his parents, guardian or family physician. * * * The law imposes upon the licensed seller the duty to see that the party to whom he sells is authorized to buy, and if he makes sales without this knowledge, he does it at his peril. * * * It is no answer to this view to say the licensee may sometimes be imposed upon and made to suffer the penalties of the law, when he had no intention to violate its provisions. This is a risk incident to the business he has undertaken to conduct, and as he

receives the gains connected therewith he must assume also, with it, all the hazards." See note 90 Am. R. 617.

The principle established by this view is that ignorance of fact is no defense where the statute makes the offense indictable irrespective of guilty knowledge. As Dixon, C. J., said: "Where a statute commands that an act be done or omitted which in the absence of such statute might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation." *State v. Hartfel*, 24 Wis. 61; 1 Wharton Crim. Law, § 88; 3 Greenleaf Ev. § 21. Our statute provides: "That no person shall be permitted to sell spirituous, malt or vinous liquors in this State without having first obtained a license from the county court," etc. Sec. 1. And again: "If any person or persons shall barter, sell or dispose of, in any manner, any spirituous, malt or vinous liquors, without first having obtained a license therefor as provided by the act, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than," etc. Sec. 9, Sess. Laws, pp. 9, 10. The language of this statute is absolute and unconditional. Its purpose is to compel every person who engages in the sale of intoxicating drinks to first obtain a license as required by the statute, otherwise he acts at his peril. Statutes of this character are in the nature of fiscal and police regulations and impose penalties irrespective of any intent to violate them—the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible. *People v. Roby*, 52 Mich. 579.

The statute makes it a positive requirement that a license shall be first obtained before a sale can be made without incurring the penalty denounced. It makes such an act indictable, irrespective of guilty knowledge, and ignorance of fact, however sincere and honest, cannot avail as a defense. Hence it is no defense to an indictment for selling liquor without a license that the defendant sold as the agent of another person.

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"It is no defense," says Mr. Wharton, "that the defendant was acting as agent for another. He is criminally responsible as principal himself, notwithstanding such agency." 2 Wharton's Crim. Law, § 1504; Bishop Crim. Law, § 1024.

In *State v. Bygbee*, 22 Vt. 34, the court say: "It is claimed that if the respondent in making the sale acted gratuitously as the mere servant of Hunt, he would not be personally liable to indictment though Hunt had no license. But we think this is not sound. If the respondent justify the act of selling under Hunt, as his principal, he must show an authority in his principal to sell. The agent who does the act can stand in no better situation than his principal. He justifies under him; and if the principal had no authority to sell, the agent could have none. Hunt having had no license to sell, the respondent must stand as principal, so far as appertains to this prosecution." See also 11 Am. & Eng. Ency. of Law, title "Intoxicating Liquor," pages 714, 715.

Standing in the place of his principal, the bar keeper is bound to know, to excuse himself from liability, that his principal is licensed to sell intoxicating liquors, as otherwise he is charged with the knowledge that such sales are prohibited and in violation of the statute. As statutes of this character bind the party to know the facts and to keep them at his peril, neither the motives nor the intent of the defendant can relieve him. When a sale is made without a license, the intent is immaterial, when the statute makes the act indictable irrespective of guilty knowledge, and in such case, ignorance of fact, no matter how sincere, cannot be a defense. It is enough that under the statute the commission of the act prohibited constitutes the offense, irrespective of the motives or knowledge of the defendant, and as his principal had no license to sell, the defendant must stand for him, so far as appertains to this prosecution.

It follows that the judgment must be affirmed.

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[Filed May 1, 1890.]

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29 508**C. B. ROSTEL, RESPONDENT, v. RAPHAEL MORAT,
EX, APPELLANT.**

EXECUTOR AND ADMINISTRATOR—SEMI-ANNUAL ACCOUNT.—It is the duty of every executor or administrator, within six months after notice of his appointment, and every six months thereafter until the estate is settled, to file a semi-annual account; and the county court must, at the first term after any such account is filed, ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed within the first six months, or any succeeding six months thereafter, after paying the funeral charges and expenses of administration, and if so it shall order and direct; but if the estate be insufficient for that purpose, it shall ascertain what per centum it is sufficient to satisfy, and direct accordingly.

EFFECT OF PAYING CLAIMS WITHOUT AN ORDER OF THE COURT.—By paying claims in advance of an order by the court, an executor or administrator takes the risk of securing the approval of his acts by the court when his accounts and vouchers shall be presented.

DISALLOWANCE OF EXECUTOR OR ADMINISTRATOR'S FINAL ACCOUNT.—If the final account of an executor or administrator be disapproved by the court, he may either appeal from the decree disallowing the same or file another account which shall meet the objections of the court.

DECREE FOR MONEY IN PROBATE PROCEEDINGS.—A decree for the payment of money in probate proceedings cannot be enforced as for a contempt. The proper process is an execution.

APPEAL from Jackson county: L. R. WEBSTER, judge.

This controversy has arisen in the course of the settlement of the estate of Julius Raspot, deceased. The defendant Raphael Morat is the executor of the last will of said deceased, and the plaintiff is endeavoring to secure the payment of a claim, in the form of a judgment, which he obtained before a justice of the peace in Jackson county against said Julius Raspot in his life-time. The cause was transferred from the county court of Jackson county to the circuit court of that county for the reason that the newly-elected judge of the county was directly interested as counsel for one of the litigants.

Raspot died on the seventh of March, 1884. On the twenty-third day of August, 1884, the will was duly proven and admitted to probate and the defendant qualified as executor and entered upon the duties of his trust. The inventory was not filed until the twenty-third day of October, 1884, by which it appears the appraised value of the property of the estate was \$222.92. On the fourth of March, 1885,

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the executor filed a final account; on March 21, 1886, he filed another final account, and on the fifth day of July, 1887, he made "a full and final statement of his proceedings."

To each of these accounts the respondent filed objections, and said accounts were disallowed by the court; but each account showed disbursements enough to absorb the estate, if the claims paid were such as the executor had the right to pay in the order in which they were paid.

On the seventh day of September the court made an order adjudging that the executor pay Rostel's claim forthwith, or that he show cause at the next term of court why he failed or refused to pay it. On the fifth day of October, 1886, the executor served and filed a notice of appeal from said order; but no undertaking on appeal was executed and the same was not prosecuted.

Afterwards, on the second day of May, 1887, C. B. Rostel filed in said court a petition for a citation requiring the executor to appear and show cause why he did not pay petitioner's claim theretofore allowed and ordered paid. The executor in answer to this citation undertook to show cause by filing one of his final settlements.

There was a hearing on this account on the sixth day of July, 1887, at which the court refused to set aside its order of September 7, 1886, and directed the executor forthwith to comply with the same.

Finally, on the thirtieth of June, 1888, the executor still failing to comply with said order by paying Rostel's claim, the court awarded a warrant for his arrest and committed him to the jail of Jackson county to be "there kept in close confinement and custody until he submits and obeys the orders of this court."

It was admitted on the argument, though it does not appear from this record, that Morat was afterwards discharged from said confinement by the circuit-judge of the first district on *habeas corpus*.

When this cause reached the circuit court it appears to have been tried by the court as to whether the executor

should pay Rosel's claim, being the same precisely which had been previously tried and determined by the county court, and said circuit court ordered him to pay it within fifteen days. It is from this order or judgment that this appeal is taken.

C. W. Kahler, for Appellant.

H. K. Hanna, for Respondent.

STRAHAN, J., delivered the opinion of the court.

The proceedings in this cause seem to be so irregular as well as prolix that it is difficult to determine just what the rights of the parties really are. There have been an unnecessary number of papers filed, many of which were copied into the journal in the county court when there was no occasion for it. And where the record ought to be full and explicit, it is frequently wanting in particularity.

The appellant's contention is, that the county court is a court of record, Art. VII, section 1, constitution, and that whatever judgment or decrees it may enter ought to be justified by the record in the particular case; that probate jurisdiction is conferred on the court by the constitution, Art. VII, section 12, and by the Code, section 895, and the manner in which it shall be exercised is fixed by the various provisions of the law applicable to the particular subject; that section 1170, Hill's Code, makes it the duty of an executor or administrator, within six months from the date of the notice of his appointment, and every six months thereafter until the administration is completed and he is discharged from his trust, to render a verified account and file the same with the clerk, showing the enumerated particulars in said section mentioned, and that section 1172 makes it the duty of the court, at the first term after the filing of the first semi-annual account, to ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed by the executor or administrator within the first six months or any succeeding six months thereafter, after paying the funeral charges and ex-

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penses of administration, and if so shall so order and direct; but if the estate be insufficient for that purpose, it shall ascertain what per centum of such claims it is sufficient to satisfy, and order and direct accordingly. These sections prescribe the duty of the executor or administrator and the court as well.

The executor in this case filed no semi-annual accounts. Each was a final account. He also took it upon himself to pay claims without any order or directions from the court whatever; and while it is believed that this is and has been the usual custom among executors and administrators in this State, it is not the course prescribed by law. By paying claims in advance of an order by the court, the executor or administrator simply takes the risk of securing the court's approval of his action when his accounts and vouchers shall be presented, and this Morat failed to do. On the contrary, the court disapproved of every account filed by him, and made an order requiring him to pay Rostel's claim in full. The executor published two notices of the hearing of each of his final accounts, one of which notices was given by order of the court.

On each of these occasions when his accounts were disallowed by the court, I think the executor might either have appealed from the order of disallowance, or he might have filed another account by way of amendment which would have met the views of the court. He saw proper to adopt the latter course, but was unable to obtain the court's sanction to his proceedings.

Having said this much in reference to the proceedings in the county court, we come to an examination of the action of the circuit court which resulted adversely to the executor. Amongst other things the circuit court found that the said executor was chargeable on account of the assets of said estate which came into his hands with the sum of \$109.83, which is properly applicable to the payment of said claim, and should be applied in pursuance of the judgment of the county court heretofore rendered and entered in this behalf. Whether this finding is correct, it is impossible for us to

determine in the present state of this record. Its correctness depends altogether on whether or not the defendant was properly charged by the court with the par value of the bank stock or the amount for which he reported he sold it, and whether or not the credit side of the account is correct, and that depends on whether or not the credits which he claims ought to have been allowed. There is a dispute and considerable uncertainty about it. The court below might have heard evidence on this subject, which we are not permitted to hear. Nor have we any satisfactory way of determining the reasonableness of many of these charges

While we are not entirely satisfied that the judgment appealed from is right, we are unable to say affirmatively that it is wrong; and inasmuch as the defendant, by failing to observe the proper course of procedure in the county court, has contributed very much to produce this uncertainty, we do not think we are called on to interfere.

If the defendant had promptly filed his semi-annual account at the end of six months from the date of the notice of his appointment, and each six months thereafter, and had paid no claims until the court determined the order of their priority, and then paid them upon the order of the court, its orders would have fully and completely protected him against any claim not thus ordered to be paid.

Though not strictly necessary, I think this case ought not to be dismissed without a word respecting the manner in which the order or decree may be enforced against the defendant. Section 1078, Hill's Code, in defining the methods of procedure in probate proceedings, provides: "The mode of proceeding is in the nature of that in a suit in equity as distinguished from an action at law." And section 406 provides: "The court or judge thereof may enforce an order or decree *other than for the payment of money* by punishing the party refusing or neglecting to comply therewith as for a contempt." These two sections taken together limit the power of both the circuit and

Opinion of the Court—Lord, J.

county courts, where a decree is for the payment of money, to an execution for its enforcement and render subdivision 5, section 650, inapplicable in such case.

The decree of the circuit court must be affirmed.

[Filed May 1, 1900.]

A. T. KYLE, APPELLANT, v. RIPPY & AMY, RESPONDENTS.

FINDINGS OF FACT TO BE DEEMED VERDICT.—When a case is tried before the court without the intervention of a jury, the findings of the court upon the facts shall be deemed a verdict, and the duty of this court is to ascertain whether the legal conclusions drawn therefrom are such as the law pronounces.

APPEAL from Jackson county: L. R. WEBSTER, judge.

LORD, J., delivered the opinion of the court.

This was an action to recover the sum of two hundred and fifty dollars as commissions for the sale of land by plaintiff as a real estate broker. The action was tried by the court without a jury by consent of the parties. After hearing the evidence, the court found as facts that the defendants agreed to pay the plaintiff the sum of two hundred and fifty dollars, if plaintiff would sell for the defendants certain lands described, but that he had failed to sell the same, or to procure a purchaser who entered into a binding contract for the purchase; and as a matter of law, that the plaintiff was not entitled to recover anything in the action, but the defendants were entitled to recover their costs and disbursements, and judgment was rendered accordingly.

The bill of exceptions contains all the evidence, and the error mainly assigned is, error in the court in finding the facts as above stated. But this court cannot look into the bill of exceptions to ascertain the facts, as the findings of the court are conclusive upon us.

In *Hallock v. City of Portland*, 8 Or. 29, it was held that when a case is tried before the court without the intervention of a jury, the findings of the court upon the

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facts shall be deemed as a verdict, and must be accepted as correct until set aside in that court. We have nothing to do with the facts as found except to ascertain whether the legal conclusions drawn therefrom are such as the law pronounces. But to enable the court to determine the correctness of the legal conclusions drawn from the findings of fact, it may be important that counsel should be vigilant to have the findings of fact stated with fullness and particularity to avail themselves of the legal objection which they desire to raise and to have determined. In the case at bar, the contention of the plaintiff is, not that the legal conclusions drawn from the facts found are incorrect and erroneous, but that the uncontradicted evidence does not warrant the findings of fact as found by the court. His assignment of error is, that the court erred in finding that the plaintiff had failed to sell the land or to procure a purchaser to enter into a binding contract, and, his argument is devoted to showing that the undisputed evidence is otherwise. In a word, he claims that a proper finding of facts would warrant the legal conclusion that the plaintiff was entitled to recover his commissions. If the legal consequences would result upon such a finding of facts as he claims that the uncontradicted evidence authorizes, and the court ought to have so found, there is no doubt that the judgment works him an injury and wrong which it is the aim of the law to avoid; but to my mind it is not clear that the mode that the plaintiff has pursued to have the error of which he complains reviewed is the proper one and can be availed here, but that injustice may be avoided, it is thought by the court, under the circumstances presented by this record, that it is safer and better to remand the cause to the trial court to make a full finding of the facts and the legal conclusions to be deduced therefrom.

And for this purpose the judgment is reversed, and it is so ordered, and that the costs and disbursements abide the result.

Statement of facts.

[Filed May 1, 1890.]

**ALLEN & KROSEL, APPELLANTS, v. GEO. M. ROWE,
E. R. HAWES AND WM. LOEB, RESPONDENTS.**

MECHANIC'S LIEN—NOTICE—NAME OF OWNER.—A notice of lien sufficiently gives the name of the owner of the land where the building or erection was placed which says: "Said real estate reputed to be owned by one E. R. H. and said building reputed to be owned by one G. M. R."

MECHANIC'S LIEN—KNOWLEDGE OF THE OWNER OF LAND—WHEN MUST BE SHOWN.—In case some person other than the owner of the land employs a material man or laborer to furnish material or to perform labor upon a building or erection on such other's land, something more is necessary to reach the title of such owner than to insert his name as owner in the notice filed with the county clerk, or to say that he is such owner or reputed owner. It must be made to appear somewhere in the record that such building or improvement was placed on his lands with his knowledge; and then the lien can only be defeated by such owner making it appear that within three days after he obtained knowledge of the construction, alteration or repair of such building or other improvement, he posted notice in writing that he would not be responsible for the same, which notice must be posted in a conspicuous place upon said land, or upon the building or other improvement situated thereon.

APPEAL from Clatsop county: F. J. TAYLOR, judge.

This is a suit to foreclose a lien for labor performed and material furnished at the request of the defendant Rowe on the premises described in the complaint, being a parcel of ground situate in the city of Astoria. Hawes owns the lot in fee, but leased the same to Rowe for the period of five years from the first day of November, 1888. Rowe employed the plaintiffs to erect the building, who, on the twenty-third day of January, 1889, and within thirty days from the time of the furnishing of the materials and the performance of said labor, filed with the county clerk of Clatsop county, Oregon, notice of their lien. The defendant Loeb was made a defendant because he held a mortgage made by the defendant Rowe on his interest in the premises to secure the payment of a note for \$1,000, which note and mortgage were dated on the twenty-seventh day of November, 1888, which was duly recorded in the office of the county clerk of Clatsop county, Oregon, on the twenty-eighth day of November, 1888, and after the plaintiffs had commenced to furnish said materials and to perform the labor for which they claim a lien. The following is the notice of lien filed by the plaintiffs of their intention to hold a lien on said

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Statement of facts.

premises except the itemized statement for materials and labor, to wit:

"STATE OF OREGON, }
County of Clatsop. } ss.

"To whom it may concern: Be it known that we, the undersigned, B. F. Allen and Fred Krosel, as partners under the name and style of Allen & Krosel, painters and contractors, hereby give notice that we claim a mechanic's and artisan's lien upon the following real estate, to wit: Beginning at a point two feet east of the northwest corner of lot 2, block 58; thence easterly and parallel to the center of Chenamus street twenty-three feet; thence southerly and at right angles to center of Chenamus street sixty feet; thence westerly twenty-three feet; thence north sixty feet to place of beginning; in the town (now city) of Astoria, as laid out and recorded by John McClure in Clatsop county, Oregon, and upon the building constructed thereon, known and called the 'Tillamook Light Saloon'; said real estate reputed to be owned by one E. R. Hawes, and said building reputed to be owned by one Geo. M. Rowe, for the following labor performed and materials furnished by us in the construction and completion of said building, to wit": * * *

The cause was referred to Chas. E. Runyon to take the evidence and report the same to the court.

Upon the evidence thus taken, the cause was tried before the court and the following findings of fact and law were made: "First—That the claim of lien made by the plaintiff herein does not contain the name of the owner nor reputed owner of the property attempted to be charged with the said lien at the time the said labor was performed and the materials were alleged to have been furnished.

"Conclusions of law: First—That said alleged claim of lien is insufficient and void. Second—That said suit should be dismissed." Then followed a decree in accordance with the findings.

W. M. Kaiser, for Appellant.

G. W. Fulton, for Respondent.

Opinion of the Court—Strahan, J.

STRAHAN, J., delivered the opinion of the court.

The right to a lien on a building for material and labor is conferred by statute, and the party claiming such lien must show a substantial compliance with the requirements of the statute or the lien must fail.

In *Kezartee v. Marks*, 15 Or. 529, we had occasion to consider to some extent the question raised by the respondent Hawes, and we there held that to affect the land with the lien the name of the owner or reputed owner must be given in the notice; that such requirement in the statute was one of substance and could not be dispensed with; and further, that when the title to the house or structure and title to the land were in different persons, and the notice specifies the name of the owner of the building or structure, but not the name of the owner of the land, the lien might attach to such building but not to the land. The only real question that the court below seems to have considered was the sufficiency of the plaintiffs' notice. On that question I think there can be no doubt.

After describing the building and the real property sought to be charged with the lien, the notice proceeds: "Said real estate reputed to be owned by one E. R. Hawes and said building reputed to be owned by one Geo. M. Rowe." On the point of objection ruled against the appellants by the court below, the notice is sufficient. But a further question seems also to demand attention. One object of this suit is to reach the title of the owner of the land upon which the building is erected and to subject it to the lien. In case some person other than the owner employs a material man or laborer to furnish material or to do labor upon such land, something more is necessary to reach the title of such owner than to insert his name in the notice filed with the county clerk and to say that he is such owner or reputed owner.

Section 8672 of Hill's Code was evidently designed by the legislature to meet such case. It provides: "Every building or other improvement mentioned in section 3669

Opinion of the Court—Strahan, J.

constructed upon any lands *with the knowledge of the owner* or the person having or claiming any interest therein shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein; and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this act, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained *knowledge* of the construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land, or upon the building or other improvement situated thereon."

Under this section when the owner of the land did not employ the laborer or material man to furnish the materials, but the same was done by some other person, it must have been done with the *knowledge* of the owner or person having or claiming an interest in the land. In such case *knowledge* of the owner or person having or claiming an interest must exist and be shown as a fact. When this fact does appear, the lien reaches and binds his interest unless he relieved himself in the manner provided in the section by posting the notice within three days after he obtained such knowledge.

I have looked carefully through the pleadings and evidence to see if the fact in any manner appeared, but am unable to discover it. There will, therefore, be a decree foreclosing the lien of the plaintiffs against the building described and the leasehold interest of Geo. M. Rowe in the land described, the building to be sold separately from the land if the plaintiff so elect; otherwise the building and the interest of the defendant Rowe in the land may be sold together, and the proceeds of the sale shall be applied, first, to the payment of the lien of the plaintiff, and next to the mortgage of the defendant Loeb, which is hereby directed to be foreclosed.

The decree of the court below will be reversed and a decree entered here in accordance with this opinion.

Statement of facts.

[Filed May 1, 1890.]

FREDERICK SCHETTER, RESPONDENT, v. THE SOUTHERN OREGON CO., APPELLANT.

BONA FIDE PURCHASER FOR VALUE OF LANDS—WHO IS NOT.—A person who has taken a contract in writing for lands, but who has paid nothing thereon, and has taken no deed for the same, is not a *bona fide* purchaser for value.

AGENCY—CONTRACT—NOTICE.—A director of a corporation who contracts with another director of the same corporation concerning the company's property who was also business manager with certain enumerated and limited powers, is chargeable with notice of any defect in the manager's power to make said contract.

TRUSTEE AND CESTUI QUE TRUST—DIRECTOR OF CORPORATION.—A director of a corporation acts in a trust capacity towards all the stockholders of the corporation and in respect to all of its property. A trustee cannot so deal with trust property as to make profit for himself. His duties as trustee require him to so manage and conduct his trust as to realize whatever profits that may accrue in the course of the business for the benefit of the *cestui que trust*. This he could not do if he were permitted to acquire the trust property for himself.

COMPENSATION FOR IMPROVEMENTS—PARTY.—The plaintiff claims to have had a contract for the purchase of certain lots, and agreed in writing to sell one of said lots to the lodge of Odd Fellows in the town, and placed the lodge in possession and covenanted to protect such possession. The lodge then placed on said lots lasting and valuable improvements. *Held*, that the plaintiff could not recover the value of said improvements placed on said lots by the lodge.

APPEAL from Coos county: R. S. BEAN, judge.

This suit comes into this court from a decree in favor of the respondent and against the appellant. The litigation commenced on the first day of September, 1888. On that day the defendant in this suit commenced an action of ejectment against Arago Lodge, No. 28, of the Independent Order of Odd Fellows, W. C. Phillips, Ole Evenson and the respondent Frederick Schetter, to recover the possession of lots six and seven in block fourteen in the town of Empire City, Coos county, Oregon. The respondent filed his answer in said action at law, and at the same time filed a cross-bill under section 381, Hill's Code, claiming that he was entitled to relief arising out of facts requiring the interposition of a court of equity and material for his defense. Upon the trial, the court found the general equities to be with the appellant; found it to be the owner in fee of the property in controversy, and that it was entitled to the possession of the same upon paying to the plaintiff the sum of money thereafter specified, the same being the

Statement of facts.

reasonable value of the permanent improvements made upon said premises by the plaintiff, less the reasonable rental value thereof.

The next paragraph of the decree is as follows: "And it is further ordered, adjudged and decreed by the court that within sixty days from and after the date of this decree, the defendant herein shall pay into the clerk of this court for the use and benefit of the plaintiff herein the sum of nine hundred and sixty-nine dollars, less the defendant's costs and disbursements in this suit, and the costs and disbursements in said action to recover said real property, and that the same be paid to the plaintiff by the clerk on demand." Other parts of the decree provide for the defendant being placed in possession of the property in controversy on certain conditions.

The facts upon which the plaintiff based his right to equitable relief, so far as may be necessary to a proper understanding of the question involved, may be briefly summarized from the complaint: That about November, 1883, the Southern Oregon Improvement Company was a private corporation organized under the laws of the State of Oregon and doing business at Empire City; that the Boston Safe Deposit and Trust Company was also a private corporation organized under the laws of the State of Massachusetts and did business in the State of Massachusetts and in the State of Oregon; that about the month of May, 1885, the said Southern Oregon Improvement Company was the owner in fee of the two lots in controversy, and at said time the Boston Safe and Deposit Company was the owner and holder of a mortgage lien upon a large amount of real property, including the two lots in controversy, in order to secure the payment of certain mortgage bonds, then and thereafter to be issued by said Improvement Company, not to exceed \$2,000,000.

The respondent claims that in the month of May, 1885, the said Improvement Company sold the said lots six and seven to him and did agree to cause the same to be released from said mortgage, in consideration that respond-

Statement of facts.

ent would convey and cause to be conveyed to it his own and the interest of others in certain tide lands containing about 367.65 acres. In the year 1887 the Boston Safe Deposit and Trust Company foreclosed said mortgage, and all of the land described in said mortgage, including the lots in controversy, were sold under said decree to Wm. M. Crapo and Wm. J. Rotch; but the respondent was not a party to said suit, and in December, 1887, the said Crapo and Rotch conveyed all of said property to the appellant; and it is alleged that the appellant holds the legal title to said lots for the respondent. The respondent alleges that he has been in possession of said lots since May, 1885, and has placed lasting improvements thereon to the value of \$2,000; that the Improvement Company and each and all of its successors in interest have neglected to convey said lots to the plaintiff although he has frequently demanded a conveyance and at the same time he expressed his readiness to comply with the terms of said agreement on his part, and that said Trust Company neglected to release its lien. This is a very brief epitome of the complaint, the material part of which is denied by the answer.

It appears from the answer that the business of said Improvement Company was such as to authorize a minority of its directors to reside out of this State; that its board of directors consisted of seven members, three of whom resided in the State of Massachusetts, and that by its by-laws three directors constituted a quorum to do business; that its capital stock was \$10,000,000 and was mainly owned by persons residing in Massachusetts and contiguous Eastern States; that each of the four directors in Oregon owned one share of said stock and no more; that the plaintiff was a director of said Improvement Company from and after the twenty-sixth day of June, 1884, until said corporation ceased to do business; that in November, 1884, one Metcalf was elected a director of said corporation and continued to act as such until November 28, 1885, at which time he ceased to be a director; that during the time Metcalf was director he was also general manager of

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its business in Coos county, Oregon, and that his powers were limited to certain enumerated things, but did not extend to any dealings in respect to, or including any power over the real property of the company; yet the said respondent with knowledge of the premises took from said Metcalf this writing:

“EMPIRE CITY, Or., June 24, 1885.

“Sold this day to Fred Schetter for twenty-five hundred dollars (\$2,500) the property lying between Getty’s stable and Jarvis’ saloon, or corner, being 100 feet square, payable in four months, or as soon after as approved, shall be tendered, and on failure of payment, then said F. Schetter agrees to pay to Oregon Southern Improvement Company one hundred and twenty-five dollars as forfeit. (Lots 6 and 7, Block 14).

W. T. METCALF, general manager.

“FRED SCHETTER.”

That by the rules of the company none of its lands could be disposed of without the consent of the directors residing in Massachusetts, and all offers to purchase same were to be submitted to them, and if they approved the same the matter was brought before the board of directors and an order made by the board directing a conveyance; but if the Massachusetts directors did not approve the same, the matter dropped; that at no meeting of the board of directors was said matter of the sale of said lots by the company or the purchase of the tide lands by it ever brought before said board, and it is alleged the lots were worth \$5,000 and the tide lands \$750. The facts on both sides are pleaded at very great length. Any other facts deemed of importance will be stated in the opinion.

S. H. Hazard, for Appellant.

Wm. H. Holmes, for Respondent.

STRAHAN, J., delivered the opinion of the court.

Upon the argument of this case in this court, the respondent’s counsel did not claim that he had made such a case as entitled him to a specific performance of the alleged contract with the Southern Oregon Improvement

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Company. The most that he claims is to be reimbursed for his alleged improvements. What is said in this opinion will therefore be devoted to the consideration of that subject. In *Bright v. Boyd*, 2 Story, 607, Judge Story laid down the rule which the plaintiff seeks to invoke in this case, and which met the approval of this court in *Hatcher v. Briggs*, 6 Or. 31. In the former case the learned justice said: "I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine as a doctrine of equity, that so far as an innocent purchaser, for a valuable consideration, without notice of any infirmity in his title, has by his improvements and meliorations added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate which the absolute owner is bound to discharge before he is to be restored to his original rights in the land." Applying the doctrine of this case and the many subsequent cases which have followed it to the facts of the plaintiff's case and he is entitled to no relief.

In the first place, the plaintiff is not a *bona fide* purchaser, for value, of said lots. He has paid nothing thereon. He obtained no deed, and he is chargeable with notice of every defect in Metcalf's authority. This court has so recently and so often stated the requisites of a *bona fide* purchaser of lands within the equity rule, that it would be simply superfluous to restate them. It suffices to say the plaintiff was not such purchaser. If he had paid value and taken a deed he must fail for another reason. He was one of the directors of the Southern Oregon Improvement Company, and was, therefore, chargeable with notice of the extent of Metcalf's powers as manager. He knew that Metcalf had no authority to sell the company's land. He knew also that before any contract in relation to the sale of any of those lands could bind the company, it must first receive the indorsement or approval of the three non-resident directors, and this, more particularly and especially where the company was dealing with one having

knowledge of such regulation. And finally, being a director of the company, he was acting in a trust capacity towards all the stockholders of the corporation, and in respect to all of its property. The rules of equity applicable to the dealings by a trustee with trust property are therefore to be applied to this transaction. Equity would not permit the plaintiff to deal with this property so as to make a profit for himself. His duty as trustee required him to exert his best judgment in handling this as well as all other property of the company, so as to make the best profit possible for the stockholders. This he could not do if he was trying to acquire the company's property for himself. One privilege which is always accorded to the *cestui que trust* in such case is to rescind the contract in a reasonable time, by restoring what had been paid thereon. In this case as nothing had been paid no question as to the terms could arise.

One other objection I think equally fatal to the plaintiff's recovery. The lot upon which the improvements were placed was bargained by the plaintiffs to the Odd Fellows lodge named as defendant in the original action, and the plaintiff covenanted with the lodge to protect its possession. The evidence shows that it was the lodge which placed the improvements on the lot for which the plaintiff seeks to recover, and not the plaintiff, and he seems to proceed on the assumption, because he covenanted to protect the lodge's possession, that, therefore, he has succeeded to its rights, whatever they may be, in respect to the improvements placed on the lot by it. No authority is cited to support this contention, and it is believed that none has gone so far.

I have not thought it necessary to cite authorities for what has been said in disposing of the main points in this case for the reason the propositions stated are elementary and incontrovertible.

So much of the decree appealed from as is specified in the notice of appeal must therefore be reversed and the plaintiff's cross-bill be dismissed.

Points decided.

[Filed May 7, 1890.]

MARY A. MITCHELL, APPELLANT, v. W. B. CAMPBELL
RESPONDENT.

ACTION TO RECOVER REAL PROPERTY—WHAT COMPLAINT MUST CONTAIN.—Under the Code of Civil Procedure of this State it is only necessary for the plaintiff in an action to recover the possession of real property to set forth in his complaint the nature of his estate in the property, whether in fee, for life, or a term of years; u for life, for whose life; if for a term of years, the duration thereof; and to allege that he is entitled to the possession of the property and that the defendant wrong fully withholds the same from him to his damage in the sum claimed by him. It is also necessary to describe the property with sufficient certainty to enable the possession thereof to be delivered, in case a recovery be had.

ANSWER—WHAT MUST CONTAIN.—The defendant must deny the allegations of the complaint which he desires to controvert, and if he claims that the property belongs to him or another, or claim any license or right to the possession thereof, he must set forth the nature and duration of such estate or license or right with the certainty and particularity required in the complaint; which really is all the facts that need be pleaded in the complaint and answer.

WHEN SALE MADE BY ADMINISTRATOR TO PAY DEBTS NOT NECESSARILY VOID.—A sale of real property belonging to the estate of a deceased person, made by an executor or administrator thereof, under an order of a county court sitting in probate, and having jurisdiction over the estate, is not necessarily void although the petition for the order of sale, the citation to the heirs, and the service of the citation are defective.

IRREGULARITIES IN SALE BY ADMINISTRATOR WHEN CURED BY ACTS OF 1874 AND 1878.—Such defects under the curative acts of 1874 and 1878 should be disregarded where the property sold at such sale has been purchased for a valuable consideration which has been paid by the purchaser to the executor or administrator or his successor in good faith, and the sale has not been set aside, but has been confirmed or acquiesced in by the court.

DEFECTS IN SALE BY ADMINISTRATOR WHICH MAY BE CURED BY LEGISLATION AND WHICH CANNOT BE.—The legislature has no power to make valid, by a retroactive statute, that which is inherently a nullity, nor render a sale of property efficacious when made in manner which it had no power to authorize; but when the sale is void merely in consequence of a failure to comply with the conditions upon which the power to make it was delegated by the legislature, and which it could have dispensed with in the beginning, and the sale been valid, it can, by the adoption of such a statute, legalize it.

STATUTE—WHEN THE COURT WILL DECLINE TO LOOK AT THE JOURNALS TO SEE IF PROPERLY ENACTED.—After an act of the legislature has been in force many years, and recognised and acted upon by the courts in numerous instances without any question having been made as to the manner of its passage, the court will regard it as having been duly adopted, and will not look into the journals of the two houses of the legislature in order to ascertain whether the bill for the act was read the number of times required by the constitution, or whether amendments proposed in one house were adopted by the other.

STATUTE OF LIMITATIONS—DISABILITY.—The act of the legislative assembly of the State, entitled, "An act to amend sections four and seventeen of chapter one of the Code of Civil Procedure, relating to the time of the commencement of an action to recover the possession of real property, approved October 17, 1878," limits such time to ten years only in case the party entitled to commence the action labor under none of the disabilities specified therein, one of which is, that the party at the time the cause of action accrued was a married woman.

Statement of facts.

MARRIED WOMAN HAS FIFTEEN YEARS IN WHICH TO COMMENCE AN ACTION TO RECOVER HER REAL PROPERTY.—When a plaintiff, a married woman, brought an action against a defendant to recover the possession of certain real property, claiming to be the owner in fee of five-ninths thereof, four of the ninths by purchase from certain heirs to the property, the other ninth by inheritance, and alleged that the other four-ninths belonged to certain other heirs of the estate; and the defendant set up as a defense adverse possession of the property, and it appeared that none of the heirs to the estate were under any legal disability except the plaintiff, who was such married woman at the time her right of action accrued and during all the time of the adverse possession; *held*, that the plaintiff was entitled to the full period of fifteen years in which to commence the action to recover the ninth interest inherited by her; but that ten years' adverse possession was a sufficient time to bar the right to recover any of the other interests in the property; and that an instruction of the court upon the trial of the action, that ten years' adverse possession was sufficient to bar the plaintiff's right of recovery without exception in regard to the ninth interest inherited, was error; *held, further*, that while the error affected only said ninth interest, yet it could not be corrected on appeal without a reversal of the entire judgment and directing a new trial; *held, also*, that adverse possession of real property for the period prescribed by the statute of limitations vests a perfect title in the possessor as against the former holders of the title. The decision upon the point in *Parker v. Metager*, 12 Or. 409, approved.

APPEAL from Union county: J. A. FEE, judge.

The appellant commenced an action in the circuit court to recover possession of certain real property, consisting of a tract of land situated in said county of Union, claiming to be the owner in fee of an undivided five-ninths interest therein as tenant in common with four other parties named in the complaint, who were alleged to be the owners of the other four-ninths thereof. The complaint contained two counts, both of which relate to the same subject matter, and allege but one cause of action. An answer was filed on the part of the respondent which contained a denial of the material allegations in the complaint, and also several defenses of new matter pleaded to the respective counts. The first of which defenses was an alleged ownership on the part of the respondent of the property in controversy. The second one was that the appellant's cause of action did not accrue within the period prescribed by the statute of limitations. The third one was adverse possession of the property by the respondent for more than sixteen years. The fourth one was that the property belonged to the estate of one P. M. Curry, who died in said county about the year 1868; that in the course of the administration of his estate it was sold at adminis-

Points decided.

[Filed May 7, 1890.]

**MARY A. MITCHELL, APPELLANT, v. W. B. CAMPBELL
RESPONDENT.**

ACTION TO RECOVER REAL PROPERTY—WHAT COMPLAINT MUST CONTAIN.—Under the Code of Civil Procedure of this State it is only necessary for the plaintiff in an action to recover the possession of real property to set forth in his complaint the nature of his estate in the property, whether in fee, for life, or a term of years; if for life, for whose life; if for a term of years, the duration thereof; and to allege that he is entitled to the possession of the property and that the defendant wrongfully withholds the same from him to his damage in the sum claimed by him. It is also necessary to describe the property with sufficient certainty to enable the possession thereof to be delivered, in case a recovery be had.

ANSWER—WHAT MUST CONTAIN.—The defendant must deny the allegations of the complaint which he desires to controvert, and if he claims that the property belongs to him or another, or claim any license or right to the possession thereof, he must set forth the nature and duration of such estate or license or right with the certainty and particularity required in the complaint; which really is all the facts that need be pleaded in the complaint and answer.

WHEN SALE MADE BY ADMINISTRATOR TO PAY DEBTS NOT NECESSARILY VOID.—A sale of real property belonging to the estate of a deceased person, made by an executor or administrator thereof, under an order of a county court sitting in probate, and having jurisdiction over the estate, is not necessarily void although the petition for the order of sale, the citation to the heirs, and the service of the citation are defective.

IRREGULARITIES IN SALE BY ADMINISTRATOR WHEN CURED BY ACTS OF 1874 AND 1878.—Such defects under the curative acts of 1874 and 1878 should be disregarded where the property sold at such sale has been purchased for a valuable consideration which has been paid by the purchaser to the executor or administrator or his successor in good faith, and the sale has not been set aside, but has been confirmed or acquiesced in by the court.

DEFECTS IN SALE BY ADMINISTRATOR WHICH MAY BE CURED BY LEGISLATION AND WHICH CANNOT BE.—The legislature has no power to make valid, by a retroactive statute, that which is inherently a nullity, nor render a sale of property efficacious when made in manner which it had no power to authorize; but when the sale is void merely in consequence of a failure to comply with the conditions upon which the power to make it was delegated by the legislature, and which it could have dispensed with in the beginning, and the sale been valid, it can, by the adoption of such a statute, legalize it.

STATUTE—WHEN THE COURT WILL DECLINE TO LOOK AT THE JOURNALS TO SEE IF PROPERLY ENACTED.—After an act of the legislature has been in force many years, and recognized and acted upon by the courts in numerous instances without any question having been made as to the manner of its passage, the court will regard it as having been duly adopted, and will not look into the journals of the two houses of the legislature in order to ascertain whether the bill for the act was read the number of times required by the constitution, or whether amendments proposed in one house were adopted by the other.

STATUTE OF LIMITATIONS—DISABILITY.—The act of the legislative assembly of the State, entitled, "An act to amend sections four and seventeen of chapter one of the Code of Civil Procedure, relating to the time of the commencement of an action to recover the possession of real property, approved October 17, 1878," limits such time to ten years only in case the party entitled to commence the action labor under none of the disabilities specified therein, one of which is, that the party at the time the cause of action accrued was a married woman.

Statement of facts.

MARRIED WOMAN HAS FIFTEEN YEARS IN WHICH TO COMMENCE AN ACTION TO RECOVER HER REAL PROPERTY.—When a plaintiff, a married woman, brought an action against a defendant to recover the possession of certain real property, claiming to be the owner in fee of five-ninths thereof, four of the ninths by purchase from certain heirs to the property, the other ninth by inheritance, and alleged that the other four-ninths belonged to certain other heirs of the estate; and the defendant set up as a defense adverse possession of the property, and it appeared that none of the heirs to the estate were under any legal disability except the plaintiff, who was such married woman at the time her right of action accrued and during all the time of the adverse possession; *held*, that the plaintiff was entitled to the full period of fifteen years in which to commence the action to recover the ninth interest inherited by her; but that ten years' adverse possession was a sufficient time to bar the right to recover any of the other interests in the property; and that an instruction of the court upon the trial of the action, that ten years' adverse possession was sufficient to bar the plaintiff's right of recovery without exception in regard to the ninth interest inherited, was error; *held, further*, that while the error affected only said ninth interest, yet it could not be corrected on appeal without a reversal of the entire judgment and directing a new trial; *held, also*, that adverse possession of real property for the period prescribed by the statute of limitations vests a perfect title in the possessor as against the former holders of the title. The decision upon the point in *Parker v. Metzger*, 12 Or. 409, approved.

APPEAL from Union county: J. A. FEE, judge.

The appellant commenced an action in the circuit court to recover possession of certain real property, consisting of a tract of land situated in said county of Union, claiming to be the owner in fee of an undivided five-ninths interest therein as tenant in common with four other parties named in the complaint, who were alleged to be the owners of the other four-ninths thereof. The complaint contained two counts, both of which relate to the same subject matter, and allege but one cause of action. An answer was filed on the part of the respondent which contained a denial of the material allegations in the complaint, and also several defenses of new matter pleaded to the respective counts. The first of which defenses was an alleged ownership on the part of the respondent of the property in controversy. The second one was that the appellant's cause of action did not accrue within the period prescribed by the statute of limitations. The third one was adverse possession of the property by the respondent for more than sixteen years. The fourth one was that the property belonged to the estate of one P. M. Curry, who died in said county about the year 1868; that in the course of the administration of his estate it was sold at adminis-

Statement of facts.

trator's sale under an order of the county court of said county, in due course of administration; that one F. T. Dick became the purchaser thereof at the price of \$605, bidden therefor; that the sale was confirmed by the said county court and a deed executed to the said Dick, and that the respondent derived title through mesne conveyances from him in good faith and that more than five years had elapsed since said sale. And the fifth one was that the appellant ought not to be admitted to allege ownership of, and right to possession to, said property, by reason of the facts set forth in the fourth ground of defense.

The appellant, after filing a motion and a demurrer to said answer, which were overruled by the court, filed a reply to the several defenses of new matter set forth in the said answer.

The first reply filed by the appellant was to the effect that the said defenses were based upon the act of the legislative assembly of the State of Oregon, entitled "An act to amend section four and seventeen of chapter one of the Code of Civil Procedure relating to the time for the commencement of action to recover the possession of real property, approved October 17, 1878," which act the appellant alleged was void upon the ground that it was not read by sections or otherwise on three several days in the State senate, nor were the rules, requiring such reading, suspended. That certain proposed amendments to said act, made in the senate, were not constitutionally concurred in by the house of representatives, nor such amendments passed by the house. That the title to the act was not read as required by the constitution, nor passed by the legislature.

To this reply the respondent interposed a general demurrer, which was sustained by the court. The appellant, thereupon, by leave of the court, filed a reply to the defenses referred to, denying all the material allegations therein set forth, except the one alleging that more than five years had elapsed since said administrator sold the property; and further replying, alleged that appellant on

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and prior to the second day of October, 1869, and ever since, had been a married woman; also that the respondent was the administrator of the estate of said P. M. Curry, and as such fraudulently and corruptly caused and procured fictitious claims to be allowed by the said county court in his own favor, for the purpose of involving the same and of cheating and defrauding the heirs to the estate, including appellant, out of said land, and vesting a colorable title thereto in himself; that he obtained the possession thereof while acting as administrator of the estate, and while in such possession of the land obtained a pretended colorable title to the same by such fraud; also that the proceedings under which the sale by the administrator were made, copies of which were exhibited, were irregular and insufficient to authorize such sale; and the appellant alleged also many other fraudulent acts committed by the respondent in the management of the said estate as administrator thereof.

The issues between the parties, after having been made up as mentioned, were tried by a jury, who returned a verdict in favor of the respondent, which was to the effect that the appellant was not the owner of any interest in the lands described in the complaint nor entitled to the possession thereof, upon which verdict the judgment appealed from was entered.

T. H. Crawford and J. W. Shelton, for Appellant.

James D. Slater, for Respondent.

THAYER, C. J., delivered the opinion of the court.

The issues in this case are too prolix. A large amount of the labor bestowed thereon was unnecessary and served no purpose except to obscure the real points of contention between the parties. In an action to recover the possession of real property under the Code of this State, the plaintiff is required to set forth the nature of his estate in the property, whether in fee, for life, or a term of years, and for whose life and the duration of such term, and that

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he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to his damage in such sum as may be therein claimed. The complaint must describe the property with sufficient certainty to enable the possession thereof to be delivered in case a recovery be had. The defendant may controvert the allegations of the complaint, and if he claim that the property belongs to him or to another, or claim any license or right to the possession thereof, he must plead it in his answer, and set forth the nature and duration of such estate, or license or right to the possession, with the certainty and particularity required in the complaint. This, substantially, is all that is required to be pleaded in that character of actions; all other matters being redundant and not necessary to be spread upon the records.

Counsel for the appellant have urged a number of points herein as error and have cited a great many authorities to sustain them; but it seems to me that the main question in the case to be tried, and which was tried in the circuit court, was whether or not the appellant's action was barred by the statute of limitations. The respondent's counsel does not, so far as I can discover, contend that the probate proceedings under which the property was sold at administrator's sale were strictly in conformity with the statute, although he insists that the sale was made in good faith, and that the funds realized therefrom were honestly applied in the payment of debts existing against the estate of the intestate; and that the irregularities and defects in said proceedings were of such a character as would require the courts, under the curative statutes of 1874 and 1878, to disregard them. The effect of these statutes upon sales of real property by administrators under irregular proceedings, has not been determined by any adjudication of this court which has come to my knowledge; but it seems to me that they have an important bearing upon the decisions regarding the validity of such sales when they are made in good faith for the purpose of paying legal claims against the estate administered upon. No one will contend that

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the legislature has power to make valid that which inherently is a nullity, or render a sale efficacious when made in a manner which it had no power to authorize. Where, however, the sale is void merely in consequence of a failure of those having the direction of it to observe conditions imposed by the legislature itself, and which it could have dispensed with in the beginning and the sale have been valid, I do not see why it could not by a retroactive act cure the defect.

Section 8 of the act of 1878, entitled, "An act to cure defects in deeds heretofore made to real property that are defective in execution or acknowledgment, and to cure defects in judicial sales of real property, and sales of lands by executors and administrators," provides as follows: "All sales by executors and administrators of their decedents' real property in this State to purchasers for a valuable consideration which has been paid by such purchasers to such executors or administrators or their successors in good faith, and such sales shall not have been set aside by the county or probate court, but shall have been confirmed or acquiesced in by such county or probate court, shall be sufficient to sustain an executor's or administrator's deed to such purchaser for such real property; and in case such deed shall not have been given, shall entitle such purchaser to such deed, and such deed shall be sufficient to such purchaser," to entitle such purchaser to "all the title that such decedent had in said real property; and all irregularities in obtaining the order of the court for such sale, and all irregularities in making or conducting the same by such executor or administrator, shall be disregarded." And section 1 of the act of 1874, entitled, "An act for the relief of purchasers of real estate at sales made by administrators or executors," provides: "When any real estate has been heretofore, or shall be hereafter, sold by any executor or administrator, under or by virtue of any license or order of any county court in this State, and said sale shall have been approved by said county court, and the pur-

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chaser shall have paid the purchase money for the same, and said sale shall have been made in good faith in order to provide for payment of the claims against said estate, and the executor or administrator shall have failed or neglected to make or execute any deed conveying such real estate to such purchaser, or if from mistake or omission in said deed, or defect in its execution, the same shall be inoperative, and the period of five years shall have elapsed after the making of such a sale, then, in such case, all such sales shall be and are hereby confirmed and approved, notwithstanding any irregularities or informalities in the proceedings prior to said sale."

These acts, according to my view, are wholesome regulations of law, and the heirs to the property sold have no grounds for complaint on account of the enforcement of their provisions. The title of the heirs to the property is subject to the paramount right of the government to direct its disposition, if necessary, for the purpose of liquidating existing claims against the estate of the decedent. The heirs' title vests in them by operation of law, but is subject to such right of disposition. If, therefore, the property is sold under an order of the probate court, by a duly-appointed and qualified executor or administrator, for the purposes mentioned, and a valuable consideration has been paid therefor by the purchaser in good faith, the heirs are not deprived of any vested right, although the conditions upon which the general statute authorized the sale to be made were not strictly complied with. Under the general statute the executor or administrator, in order to obtain a license to sell real property belonging to the estate of the decedent, must file a petition containing certain facts. The probate court must thereupon issue a citation to the heirs to show cause why the property should not be sold to pay claims against the estate, which must be returned with proof that it had been served in the manner prescribed by statute.

In proceedings of that character, a defect in the petition, citation or in the proof of the service of the citation, will,

under the general statute, render the sale a nullity. And although an order were made in due form to sell the property, and it were sold for its full value by the executor or administrator, and the proceeds were received by him and applied in good faith to the payment of the debts against the estate, which are charged by law upon the property, yet the heirs could reclaim it freed from such charge. For the purposes, therefore, of preventing such flagrant injustice, the said curative acts were passed. And it cannot be maintained that they were adopted in order to obviate the effect of mere informalities. The legislature, for the purpose of preserving to the heirs their inheritance, provided that certain prerequisites should be observed as a condition to the right of the representative to legally sell it. The effect of the said provision was, that a sale made without a compliance with such prerequisites was void, and in order to prevent such consequence in a certain class of cases, the said curative statutes were adopted. Their object evidently was to render valid sales made under the circumstances specified in the sections of said acts above set out, which would otherwise have been void. It was to prevent injustice, which is ample apology for upholding that character of legislation. The view I have endeavored to indicate herein is much better expressed in a note by Mr. Brightly appended to the decision in the case of *Wilkinson v. Leland*, 2 Peters, 627, as follows: "The legislature has power to validate a prior acknowledgment of a deed or mortgage: *Journey v. Gibson*, 56 Penn. St. 57, or to validate a void contract, *Watson v. Mercer*, 8 Pet. 88, such as the prior conveyance of a married woman. *Jones' Appeal*, 57 Penn. St. 369. To the objection that such laws violate vested rights of property, it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character; consent to remedy the wrong is to be presumed. The only right taken away is the right dishonestly to repudiate an honest contract or conveyance to the injury of the other party. Even where no remedy

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could be had in the courts, the vested right is generally unattended with the slightest equity. *Randall v. Kreiger*, 23 Wall. 149."

If the construction of the two acts suggested, which is obviously in accordance with the intention of the legislature, be correct, and the power to provide that a sale by an executor or administrator of the real property of the decedent shall be regarded valid, which under the existing law would have been deemed a nullity, reside in that body, then all the principal exceptions relied on by the appellant's counsel, aside from those relating to the statute of limitations, may easily be disposed of. That the power to validate a sale in such cases which in legal effect was void is within the province of legislative functions, is fully sustained by *Wilkinson v. Leland*, *supra*. Judge Story, who delivered the opinion of the court in that case, at page 658, says: "The question then arises whether the act of 1792"—referring to an act of the legislature of Rhode Island—"involves any such exercise of power"—to divest the vested rights of property, and transfer them without the assent of the parties. "It is admitted that the title of an heir by descent, in the real estate of his ancestor, and of a devisee in an estate unconditionally devised to him, is, upon the death of the party under whom he claimed, immediately devolved upon him, and he acquires a vested estate. But this, though true in a general sense, still leaves his title encumbered with all the liens which have been created by the party in his life-time, or by the law at his decease. It is not an unqualified, though it be a vested, interest, and it confers no title, except to what remains after every such lien is discharged. In the present case, the devisee under the will of Jonathan Jenckes, without doubt, took a vested estate in fee in the land in Rhode Island. But it was an estate still subject to all the qualifications and liens which the laws of that State annexed to those lands. It is not sufficient to entitle the heirs of the devisee now to recover, to establish the fact that the estate so vested has been divested; but that it has been divested in

a manner inconsistent with the principles of law." Again, at pp. 660, 661, he says: "What then are the objections to the act of 1792? First, it is said, that it divests vested rights of property. But it has been already shown that it divests no such rights, except in favor of existing liens of paramount obligation; and that the estate was vested in the devisee expressly subject to such rights. Then, again, it is said to be an act of judicial authority, which the legislature was not competent to exercise at all, or if it could exercise it, it could be only after due notice to all the parties in interest, and a hearing and decree. We do not think that the act is to be considered as a judicial act; but as an exercise of legislation. It purports to be a legislative resolution, and not a decree. As to notice, if it were necessary (and it certainly would be wise and convenient to give notice where extraordinary efforts of legislation are resorted to which touch private rights), it might well be presumed, after the lapse of more than thirty years, and the acquiescence of the parties for the same period, that such notice was actually given. But by the general laws of Rhode Island upon this subject, no notice is required to be or is, in practice, given to heirs or devisees, in cases of sales of this nature; and it would be strange if the legislature might not do, without notice, the same act which it would delegate authority to another to do without notice. If the legislature had authorized a future sale by the executrix for the payment of debts, it is not easy to perceive any sound objection to it. There is nothing in the nature of the act which requires that it should be performed by a judicial tribunal, or that it should be performed by a delegate instead of the legislature itself. It is remedial in its nature to give effect to existing rights.

"But it is said that this is a retrospective act, which gives validity to a void transaction. Admitting that it does so, still it does not follow that it may not be within the scope of the legislative authority in a government like that of Rhode Island, if it does not divest the settled rights of property. A sale had already been made by the execu-

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trix under a void authority, but in entire good faith (for it is not attempted to be impeached for fraud), and the proceeds, constituting a fund for the payment of creditors, were ready to be distributed as soon as the sale was made effectual to pass the title. It is but common justice to presume that the legislature was satisfied that the sale was *bona fide* and for the full value of the estate. No creditors have ever attempted to disturb it. The sale, then, was ratified by the legislature, not to destroy existing rights, but to effectuate them, and in a manner beneficial to the parties. We cannot say that this is an excess of legislative power, unless we are prepared to say that in a State not having a written constitution, acts of legislation having a retrospective operation are void as to all persons not assenting thereto, even though they may be for beneficial purposes, and to enforce existing rights. We think that this cannot be assumed as a general principle by courts of justice. The present case is not so strong in its circumstances as that of *Culder v. Bull*, 3 Dall. 386, or *Rice v. Parkman*, 16 Mass. 326, in both of which the resolves of the legislature were held to be constitutional."

Whether the sale of the property in controversy by the administrator to the said F. T. Dick was made under circumstances that would bring the transaction within the provisions of said two acts, was a question of fact proper to be submitted to the jury; and they may be presumed to have found by their verdict that the sale was made under such circumstances. And the appellant's counsel do not appear to claim that the proofs in the case were not sufficient to warrant the jury in so finding. Said counsel do, however, claim that the petition for the order to sell and the citation to the heirs were defective; but that, in view of the said curative acts, would not necessarily render the sale void. They, however, contend that the acts do not cure jurisdictional defects, and cite, among other authorities, the language of Mr. Cooley upon the subject in his work on *Const. Lim.* p. 457, 5th Ed., where he says: "A retrospective statute curing defects in legal proceedings

where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden." But the learned author did not mean by this that defects arising from a failure to set forth the necessary facts prescribed by statute to confer jurisdiction upon a court in regard to a particular matter, could not be cured by subsequent legislation, where the court had general jurisdiction of the subject. He says at page 458, same work: "The rule applicable to cases of this description is substantially the following: If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." Also at page 471: "But the healing statute must in all cases be confined to validating acts which the legislature might previously have authorized. It cannot make good retrospectively acts or contracts which it had and could have no power to permit or sanction in advance." This last clause indicates very clearly what the author did mean by "curing defects in legal proceedings where they do not extend to matters of jurisdiction." He evidently meant matters not within the jurisdiction of the legislature. That body could not cure a defect arising from a failure to serve process in an action or suit in accordance with some prescribed mode, as it has no power to authorize an adjudication against the party to the action or suit without such service being made. A failure to acquire original jurisdiction over the person or property of a defendant in any case would doubtless come under the same rule. But where a court obtains jurisdiction over a special subject matter given to it by law, as probate courts do over the estates of deceased persons

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after an executor or administrator of the estate has been duly appointed and qualified, and the court has proceeded to exercise its jurisdiction in regard to a matter connected therewith without having complied with the mode which the legislature had prescribed, but which it could have dispensed with, then, the proceeding of the court, although irregular and defective, could be confirmed by subsequent legislation when justice would thereby be promoted.

The appellant's counsel also contend that the circuit court committed error in refusing to give the following instruction: "If you find from the evidence that the defendant entered the premises without title, the fact that defendant has acquired by adverse possession, the title of the tenants in common who were not made parties to this action, does not preclude the plaintiff from recovering the whole of the premises." Said counsel attempt to sustain their contention that said instruction should have been given, upon the authority of *Chipman v. Hastings*, 50 Cal. 310, which seems to be in point. The supreme court of California held in that case that the question as to whether the title of the tenants in common, who were not parties, had been defeated by such an adverse possession on the part of the defendant, could be determined only in an action to which they were parties. The view taken by that court must have been that the legal title to the property was not acquired by adverse possession, that such possession would merely operate as a bar to the right of entry of the owner of the fee. Such, however, is not the rule in this State. This court held in *Parker v. Metzger*, 12 Or. 409, that adverse possession of real estate for the period prescribed by the statute of limitations vested a perfect title in the possessor as against the former holder of the title and all the world, and that he was entitled to all the remedies which were incident to possession under a written title. According to that view the respondent's tenure in the property was as certain under the proof of an adverse holding during the period prescribed by the statute of limitations as it would have been under an

absolute deed of conveyance from such tenants in common.

The point claimed by appellant's counsel that the act of the legislative assembly of the State, approved October 17, 1878, purporting to be an amendment to sections 4 and 17 of chapter one of the Code of Civil Procedure, was void for the reasons stated in the appellant's reply, cannot, at this late date, be entertained. Said act had stood upon the statute book for nearly ten years, and been recognized and acted upon by the courts in a number of cases without being questioned. Under such circumstances it should be presumed to have been adopted in conformity with the requirements of the constitution. If the matter had been brought to the attention of the court soon after the act was passed it would have been proper to have inquired as to whether the bill was read in the respective houses the number of times, and in the manner prescribed by that instrument, and as to whether proposed amendments to it in one of the houses had been regularly concurred in by the other; but, after having been acquiesced in for so great a length of time, it would be highly detrimental to public interest to determine it invalid in consequence of an informality in its enactment, when it is evidently the express will of the legislature. The effect of the act was to change the time for the commencement of an action to recover the possession of real property from twenty years to ten years, which has always been regarded by the community as a wholesome regulation, and I do not think that it would be either just or politic to decide it a nullity at this late date, even if the journals of the two houses of the legislative assembly do fail to show the facts claimed by appellant's counsel.

But the act of 1878, in prescribing the period of ten years in which an action shall be brought to recover real property, provides, among other things, that if any person entitled to bring the action be, at the time the cause of action accrued, a married woman, the time of such disability shall not be a part of the time limited for the commencement of the action; but the period within which the action shall be

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brought shall not be extended more than five years by such disability, nor be extended longer than one year after it ceases. The appellant herein being a married woman at the time her alleged cause of action for the recovery of the ninth interest in the real property in question inherited by her arose, was entitled to the full period of fifteen years in which to commence her action to recover such interest, while she was only entitled to the period of ten years in which to commence her action for the recovery of the other interests conveyed to her, assuming what seems to be conceded by her counsel, that the statute had begun to run against the respective owners of those interests at the time they were so conveyed. The disability of the appellant was set forth in her reply to the defense of the statute of limitations contained in the answer, to which the respondent filed a demurrer and the court sustained it, and subsequently instructed the jury that ten years' adverse possession by the respondent was sufficient to bar her right of recovery, without making any exception in favor of the interest inherited by her. This was error. The holding should have been that the appellant was entitled to the period of fifteen years in which to commence the action to recover that particular interest. I doubt very much whether the error, as a matter of fact, prejudiced the appellant's case, as the jury very probably found that the sale of the property by the administrator under the curative acts was valid; but the appellant was entitled to the benefit of the law and may have been prejudiced by its having been withheld from her.

Another contention of appellant's counsel is, that the statute does not begin to run in such a case until the administration of the estate has fully terminated. I have no doubt but that the statute does not begin to run while the property is subject to the possession of the administrator for the purposes of being applied to the satisfaction of claims against the estate, as such possession is not inconsistent with the title of the heir.

Points decided.

Where, however, the administrator has sold the property under an order of the probate court, the sale been confirmed, and a deed executed to the purchaser, as was done in this case, the matter stands differently. There the sale and possession of the purchaser under it operate as dis-seizin of the heir, and the right claimed by the purchaser under the sale is in hostility to his title. And if such possession be open, notorious and continuous, under a claim of ownership of the property, during the period prescribed by the statute of limitations applicable in such cases, it will ripen into a valid title, although it were wrongful in the outset.

I am unable to discover any error in the record herein aside from the one suggested. The judgment appealed from should therefore be affirmed except so far as it affects the ninth interest claimed by the appellant in the property as heir at law of P. M. Curry, deceased; but as to that interest it should be reversed and the appellant have a new trial concerning her right to recover it in view of the law that her claim thereto, if she has any, is only barred by an adverse possession for the period of fifteen years; and such would be the order of the court if it had the legal right to make it. The court, however, is compelled to reverse the judgment *in toto*, and remand the cause to the circuit court for a new trial in accordance with the principles of this decision. Such will therefore be the order.

[Filed May 8, 1890.]

STATE OF OREGON, RESPONDENT, v. C. C. TOWNSEND,
APPELLANT.

ACCOMPLICE—CORROBORATIVE EVIDENCE.—Where the corroborative evidence showed that the defendant and his accomplice were together at or near the place where the larceny of the animal was committed under circumstances which indicated concert between them in furtherance of a common purpose; *held*, that the evidence did tend in some degree to connect the defendant with the commission of the crime.

19	213
28	336

Opinion of the Court—Lord, J.

APPEAL from Umatilla county: JAS. A. FEE, judge.

The defendant was jointly indicted with others, and convicted of the crime of larceny of a cow, charged to have been committed on the fourteenth day of January, 1889. One Jed Beal, a co-defendant, testified as an accomplice to the particulars of the stealing of the cow by the defendant and himself. The evidence corroborative of the accomplice Beal, testified to by one Charles Stencil, was as follows. "About January 14, 1889, I was at Frank Beal's place, about four miles from town. At one time that night, I think about 8 o'clock P. M., Jed Beal was there, and he left, and a little later he came back to the house with the defendant Townsend. Townsend was then introduced to me by Jed Beal as 'Jack Morton.' In a short time they left again. I know the pasture where the cow was; I heard next day the cow was missing; there was no one else at the house when the defendant came."

The owner of the cow also testified that she was stolen from his pasture on the night of January 14, 1889. The other evidence in the case shows that the place where the witness Stencil saw the defendant Townsend that night was on Wild Horse creek, between four and five miles from the town of Pendleton, and a short distance from where the cow was stolen.

The State having rested, the counsel for the defendant moved for a non-suit on the ground that there was not sufficient evidence of the defendant's guilt to be submitted to the jury without further evidence.

J. C. Leasure, for Appellant.

J. L. Land, district attorney, and *J. J. Balleray*, for State.

LORD, J., delivered the opinion of the court.

The question raised is, whether the testimony of the accomplice Beal was sufficiently corroborated to sustain the verdict and judgment. The testimony of the accomplice is full, stating the circumstances in detail under which he and the defendant, on the night charged, stole

the cow from the pasture of her owner, drove her to the slaughter pen in Pendleton, and delivered her to the other co-defendants, as had been previously arranged, where she was slaughtered. The contention for the defendant is, that the corroborative evidence only shows that he was in the vicinity where the crime was committed, and that under the ruling in *State v. Odell*, 8 Or. 30, such evidence was held to be insufficient. As this case is relied upon, it needs to be examined to understand the principle applied. In that case "the testimony of the other witnesses only tended to show that Odell was in the town about the time of the commission of the alleged crime, and that a sack of flour was missed from the place where the larceny was alleged to have been committed. Such evidence, said the court, did not tend to connect the appellant with the commission of the crime." And again to the same point in refusing to give the following instruction: "The fact of the presence of the defendant Odell in the same town at the time of the commission of the offense, or immediately before or afterwards, is not sufficient evidence to connect the defendant Odell with the commission of the crime charged in the indictment," which the court thought pertinent to the facts, and should have been given, and was therefore error to refuse it. This ruling was undoubtedly correct, as there was nothing in the mere fact of the presence of the defendant Odell in the same town that was unusual, or which was not likely to occur without any previous arrangement between him and his co-defendant to commit the offense. But where the facts show that the defendant and his accomplice were together at a place under circumstances not likely to have occurred unless there had been concert between them, the case presents a different aspect. In the former—*State v. Odell*—there was nothing in the circumstances not likely to happen without any previous arrangement between the defendant and his accomplice, and alone, therefore, could not have the effect or tend to connect the defendant with the commission of the crime; while in the latter, when the

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circumstances are such as are not likely to occur without some previous understanding or concert between them, they indicate an identity of purpose which tends to connect the defendant with the commission of the crime.

In the case at bar, the defendant and his accomplice are not only found together at an out-of-the-way place, where they could have no business, and would not likely be without some previous arrangement between them, but it is at the time and place from which the cow was stolen. Nor is this all. The facts show that Frank Beal, the brother of the accomplice, lived near the pasture from which the cow was stolen, which, perhaps, might furnish some excuse under some circumstances for the presence of Jed Beal in that vicinity; but that his accomplice did not take the defendant in the house when he first came, but that a little later he left the house and came back with the defendant, whom he introduced under an assumed name. They are thus not only together at an unusual hour and place in the vicinity of the place from which the cow was stolen, but they have advanced with the precaution of finding out that there is no one at the house but Stencil, to whom the defendant is introduced under a false name. Why masquerade his identity under a false name at such a place, under the circumstances, unless for the purpose of concealment, or to avoid the discovery of some contemplated act? He could furnish no excuse for being where he was under an *alias*, and if it be conceded that his accomplice, under some circumstances, may have had one by reason of his brother living near the place where the cow was stolen, it is utterly destroyed by his conduct in the premises, which indicates a formed design to mislead as to the defendant, and of which the defendant was cognizant, and concerning which he understood the purpose to be served thereby. Taking these facts together, do they not tend to show that the defendant and his accomplice were at the place where the larceny of the cow was committed by concert between them, formed in furtherance of a common purpose; and that their conduct at the time was characterized by devices

Statement of facts.

intended to mislead, and to protect the defendant against discovery of the crime contemplated? They show that the defendant was not only in the vicinity when the crime was committed, but that he was there under a false name, and at night, and under circumstances not likely to occur without concert between him and his accomplice in furtherance of some common enterprise. In such case it can hardly be said that the facts do not tend in some degree to connect the defendant with the commission of the crime. As this is the only question we deem necessary to be decided on this record, it results there was no error, and that the judgment must be affirmed.

[Filed May 8, 1890.]

D. W. BAILEY, APPELLANT, v. N. D. DAVIS, RESPON-
DENT.

MASTER AND SERVANT—AGISTER OF CATTLE.—When the relation of master and servant exists, the servant can acquire no lien on his master's cattle for depasturing or feeding them under section 3634, Hill's Code.

INSTRUCTIONS—ABSTRACT PROPOSITIONS OF LAW.—An instruction to the jury based on no evidence in the case is abstract and may be misleading.

APPEAL from Umatilla county: JAS. A. FEE, judge.

This is an action of replevin to recover about fifty head of cows. The complaint is in the usual form. The answer, after denying the material allegations of the complaint, alleges, in substance, that the defendant was entitled to the possession of the property described in the complaint and that he had a special property therein, under and by virtue of the following facts, to wit: That on or about the twenty-eighth day of November, 1888, at Umatilla, Oregon, the defendant, at the request of one Cripe, who was then and there the owner and in the lawful possession of said property, took said cows to care for, attend, feed and herd, and that defendant so cared for and bestowed labor and attention in feeding and herding said cows from the twenty-eighth day of November, 1888, until the ninth day of April, 1889, and that said care and

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Opinion of the Court—Strahan, J.

attention was reasonably worth \$155.20, and that he has a lien on said property for said sum. The other facts appear in the opinion. The defendant had judgment. Plaintiff appeals.

J. J. Balleray, for Appellant.

No appearance for Respondent.

STRAHAN, J., delivered the opinion of the court.

As near as we can determine from this record, the defendant sought to retain the possession of the cattle in controversy under section 3684, Hill's Code, which gives to any person who shall depasture or feed any horses, cattle, hogs, sheep, or other live stock, or bestow any labor, care or attention on the same at the request of the owner or lawful possessor thereof, a lien for his just and reasonable charges and authorizes him to retain the possession of such property until such charges be paid.

On the trial the plaintiff gave evidence tending to prove that he was the owner of all of said property and was entitled to the immediate possession thereof, and that prior to the commencement of the action he had demanded the same from the defendant who had refused to deliver it. The plaintiff's evidence further tended to show that about the month of October, 1888, plaintiff leased the property in controversy to one A. J. Cripe, and that prior to the month of April, 1889, Cripe forfeited said lease by failing and neglecting to pay the rent mentioned in said lease for the use of said cattle, and that about April 1, 1889, Cripe "left between two days"; that the cattle in controversy were known as the John Ward and John Knight dairy cows.

The defendant testified as a witness in his own behalf, in substance: I know the band of cows mentioned in plaintiff's complaint; I was herding them about the first of last April; I know the cattle's brand; it was "O. K."; those branded "O. K." Cripe got of Bailey; two more, known as the "Wagenblast cows," came from town here; it was reasonably worth \$35 per month to herd the cows; I herded them for about three months at the request of A.

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J. Cripe; the herding amounted to \$155; when the plaintiff demanded them of me on the sixth of April, 1889, I refused to surrender them and told him I held them for my labor of herding; I had possession of them at that time; I had the possession of them all the time and herded them on the Umatilla reservation and not on Cripe's ranch. On his cross-examination the defendant testified: The cows belonged to the "O. K." dairy on Wild Horse creek; I first went to work there in November, 1888, on the dairy ranch; there were some cows there then; some of the "O. K." cows; the John Knight cows were there; the cows were not all there; A. J. Cripe was running the ranch when I first went there; A. J. Cripe was running the place when I first had anything to do with the cattle; on November 8, I believe, arrangements between myself and Cripe were made; I hired to work for him at the dairy for \$30 per month and board; I continued to work till about the seventh of February on dairy work, then went to herding; Cripe agreed to pay me \$35 per month for herding and board me; the arrangements for me to herd were made out at the ranch; I think Fred and Jack Bowman and Henry Dobson were present; he was to pay me by the month; I did not herd in a pasture; I herded on the reservation; I paid nothing for the privilege; I had plenty of grass of my own; I got it by driving on; I had as much right as any other herder; I owned no land and bought no privilege; Cripe told me to drive on the reservation; from February 7 I worked around the ranch evenings and mornings; Cripe was living there; I milked some of the cows; I drove them out in the morning and back at night and helped milk; sometimes four hands milked and sometimes three; they were Cripe's hands. * * * I swear that Cripe turned over those cattle to me for the purpose of being herded; he said he wanted me to take the cattle of him and herd them and bring them in and take them out; they were milked in the barn; driven in and tied in the barn; they slept there at nights—every night; it was in Cripe's barn; Cripe told me that I could hold the cows for my pay; that

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he couldn't pay me till spring; I told him I would wait till spring.

John Knight testified that he was interested with Cripe in these cattle; that witness left the ranch in December; saw defendant there up to the time that Cripe run away; he first helped on the farm; helped milk after witness came away; hauled straw in December and January; was with Cripe when defendant first came to work; I paid \$50 for the privilege of herding these cattle on the reservation from June 1, 1888, to June 1, 1889; he, Cripe, came in on the same privilege, and that is the way the cattle came to be herded on the reservation.

There were some other witnesses, but this is the material part of all the evidence.

The court gave this instruction, to which an exception was taken: "First—That if the jury find from the evidence that at the time of the demand of the plaintiff for the possession of the cows in question, and at the time of the commencement of this action the defendant was in possession of said cows, and that the defendant held said cows and herded and cared for the same prior to said time at the request of the owner or lawful possessor, and that the defendant took and held said cows for such purpose at the request of the owner or lawful possessor, then the defendant is entitled to the possession of said cows and may retain possession of the same until the just and reasonable charges of such care, attention and herding are paid."

1. This instruction follows the language of the statute very closely, and in a proper case no objections could be urged against it; but under the facts before the jury in this case it was purely abstract and was necessarily misleading. It assumed and the jury doubtless understood that there was some evidence before them upon which the instruction could be based, but there was none whatever. The defendant's relation to Cripe was that of a servant, and the relation of master and servant, and none other existed between Cripe and the defendant. The defendant had no

more lien for driving these cows out to the reservation for Cripe and back in the evening than he had for helping to milk them upon their return or for hauling straw, and he had no lien in either case. Nor while said relation of master and servant continued could he have any separate or independent possession of said property. Whatever service he performed or whatever authority he exercised was for Cripe and in its performance he represented him. The instruction given by the learned circuit judge was at variance with this view and was error.

It is true that the court followed the foregoing instruction by a number of others by which the jury was informed that no man working about the ranch and doing the usual work of a hired man about the ranch has any lien on the property of his employer and has no lien on his employer's cows, though part of his services should consist in herding them. And this: "No man employed for wages to herd cattle has any lien on the cattle for reasonable compensation." The court further told the jury: "If you find the defendant was a hired man working for wages, you must find for the plaintiff." And further: "Where the relation of master and servant exists no lien accrues." These instructions are correct statements of the law, but they do not purge the case of the error already committed by the court in giving the first instruction.

2. Here is an instruction given by the court which is erroneous for the same reasons that number one was an error: "It is for the jury to say whether or not there was an actual transfer of the possession of the property, and if you find from the evidence that these cattle were turned over to the defendant for the purpose of being herded, and defendant performed said service, and that he had the actual and exclusive possession, then he has a lien thereon, provided that the relation of master and servant did not exist and that an original and independent contract had been made for such herding; but if you find these cattle were not turned over, as above stated, then you must find for the plaintiff." All of this instruction down to the

Points decided.

proviso necessarily assumes that there was some evidence before the jury which would authorize the jury to find the facts therein recited. I look in vain for such evidence but fail to find it, and it is for that very reason such instructions are always erroneous. However correct they may be as abstract propositions of law and as applied to a proper case, they in effect tell the jury that there is evidence before them from which such facts may be found, and in that way such instructions may work serious injury to one party or the other. A number of other exceptions were taken and appear in the transcript, but it is believed those already noticed sufficiently indicate the views of this court to answer all the purposes of another trial, should one be found necessary.

The judgment appealed from must therefore be reversed and the cause remanded to the court below for a new trial.

[Filed May 12, 1890.]

MARY M. RHODES, APPELLANT, v. JOHN MCGARRY,
ZOETH HOUSER, J. W. FLACK, ELIZABETH
HARDWICK AND I. R. DAWSON,
RESPONDENTS.

ATTACHING CREDITOR WHEN NOT DEEMED A PURCHASER IN GOOD FAITH UNDER SECTION 150, HILL'S CODE.—An attaching creditor under a writ of attachment levied upon real property, will not be deemed a purchaser in good faith and for a valuable consideration of the property under section 150, Civil Code, as against an owner of a prior equity in the property, unless it appear that the attachment was duly issued and levied upon the property to enforce collection of a valid debt; that a certificate was duly made, delivered, filed and recorded as provided in section 151, Civil Code, and that up to the time of the consummation of these proceedings the creditor had no notice or knowledge of such prior equity.

EQUITY—SUIT TO RESTRAIN SALE OF ATTACHED PROPERTY—ANSWER—WHAT MUST CONTAIN.—And where, in a suit by the owner of the outstanding equity, which included the equitable title to the property, against attaching creditors and others to restrain them from selling it upon executions issued to enforce liens alleged to have been created against it by virtue of attachments proceeding in their favor and against a party in whom the legal title to the property remained; *held*, that an answer filed by them to the complaint in the suit, which merely traversed the plaintiff's allegations and did not set forth affirmatively the issuance of the attachments and other facts above mentioned and referred to, was insufficient to entitle them to claim to occupy the standing of purchasers in good faith of the property.

ATTACHMENT—OUTSTANDING EQUITY—PRIORITY.—The prior outstanding equity held to be paramount to the right acquired by the levy of the attachments.

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23 601
33* 971
32* 755

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19 222
147 371

19 222
48 474

Statement of facts.

APPEAL from Umatilla county: JAS. A. FEE, judge.

The appellant commenced a suit against the respondents in the circuit court to reform a deed to real property, executed by the respondent McGarry to appellant; also to restrain the other respondents from selling real property which she claimed was intended to be conveyed to her by such deed.

The appellant alleged in her complaint that on the twenty-fourth day of February, 1885, said McGarry was the owner in fee and in possession of block 285 of the Reserve addition to the town of Pendleton, Umatilla county, and that, on said last-mentioned date, in consideration of \$100 paid to him by her, sold to her said block, and for the purpose of conveying it to her executed to her a deed; that the party who wrote the deed erroneously and by mistake wrote therein "Block No. 258" instead of and for "Block No. 285"; that by the mutual mistake of the parties said deed was executed and delivered to appellant in said condition; that under and by virtue thereof and of said sale, appellant entered upon and took possession of block No. 285, and thereafter sold the same to one George Mathews, and executed to him a deed of conveyance to the same containing a general covenant of warranty; that thereafter said Mathews executed a deed to Elizabeth Hardwick conveying to her said block 285, which deed also contained a general covenant of warranty; that the respondent Flack, on the twenty-fourth day of September, 1888, commenced an action in said circuit court against said McGarry to recover the sum of \$2,000 and upwards upon a debt claimed to be due him from said McGarry, and sued out a writ of attachment in said action, which was delivered to respondent Houser as sheriff of said county, who, by virtue thereof, proceeded to attach said block 285 as the property of said McGarry; that said Flack subsequently obtained a judgment in said action against McGarry and an order for the sale of said block, and caused an execution to be issued thereon, delivered to said Houser as such sheriff, who, by virtue thereof, was

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proceeding to sell the same; that the respondent Dawson, also on said twenty-fourth day of September, 1888, commenced an action in said circuit court against said McGarry, and subsequently obtained a judgment therein against him for \$1,200 and upwards, and an order for the sale of said block, and caused an execution to be issued thereon to said Houser as such sheriff, who was threatening to sell said block under and by virtue thereof; that at the time of the attachment of the said block the said Elizabeth Hardwick was in the actual, open and notorious possession of it; that she was unwilling and had refused to be a party plaintiff to the suit and therefore appellant had made her party defendant. The appellant also alleged notice and knowledge upon the part of the respondents Houser, Flack, and Dawson, of the alleged mistake in the deed of conveyance from McGarry to her, and also of such possession of said block 285 in her and her said grantees; and also charged in the complaint a conspiracy and confederation on the part of the defendants in the suit to cheat and defraud her and render her liable upon her covenant of warranty contained in her deed to said Mathews, and that for said purpose said Flack and Dawson had caused the said block to be levied upon by said Houser, as such sheriff, under the attachment proceedings. She also alleged the ordinary facts entitling said circuit court, as a court of equity, to take cognizance of the suit, and demanded as relief that said McGarry be compelled to execute to her a good and sufficient deed to the block, and that said Houser, Flack, and Dawson be enjoined from selling it.

The respondents filed an answer to the complaint denying the allegations contained therein relating to McGarry's ownership of the block, the sale thereof to appellant, the mistake in the deed, the several conveyances thereof, possession of it by the grantees, and the alleged conspiracy and confederation of the respondents; but did not set forth therein any affirmative defense.

The cause was referred to a referee to find the facts and

Statement of facts.

conclusions of law. The referee subsequently made his report to the court in which he found that said McGarry, at the time alleged in the complaint, was the owner in fee of the block; that at said date he sold it to appellant by deed, but that by mutual mistake of the parties he made, executed and delivered to her a deed conveying block No. 258, instead of said block No. 285, which deed was received by appellant, she then believing it was a deed to said block No. 285, and that said appellant immediately went into possession of the south half of said block No. 285 and remained in possession thereof for nine months; that on May 8, 1887, appellant and her husband, for a valuable consideration, executed and delivered a deed of conveyance of said block No. 285 to one George W. Mathews in which appellant warranted the title as against all lawful claims and demands whatever; that said Mathews took possession of the south half of said block 285, and remained in possession thereof for three months; that on December 6, 1887, said Mathews and his wife, for a valuable consideration, executed and delivered to said Elizabeth Hardwick a deed of conveyance of said block 285, which was valid between the parties and those having notice thereof; that said Elizabeth Hardwick soon thereafter entered into possession of the south half of said block and held possession of the same until about September 1, 1888, at which time she removed therefrom, and has since been residing upon another block in the town of Pendleton, and has only been in possession of said south half of said block 285 by having an enclosure around the same and certain improvements thereon; that said last-mentioned deed contained a covenant of general warranty; that on September 24, 1888, said Flack commenced the action mentioned in the complaint against said McGarry and caused the said writ of attachment to be issued; that it was placed in the hands of said Houser as sheriff of said county of Umatilla for service; that said Houser at that time was the sheriff of said county, and that by virtue of said writ he thereupon attached said block 285; that thereafter judgment was recovered in said

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county, Oregon, and that in filling out the said deed the said block was by mistake described as block 258. Said findings, as to the conveyance of said block 285 by appellant to George W. Mathews, his conveyance to Elizabeth Hardwick, and the taking possession of, and occupying the said block by the said parties, respectively, are also fully sustained by the testimony and exhibits. There can be no doubt but that the appellant, as against the said McGarry, is entitled to a decree to compel the reformation of the said deed in the particular referred to. Nor can there be any question but that the appellant, as a matter of justice, should be entitled to a decree against the respondents Houser, Flack and Dawson, enjoining them from proceeding to sell said block upon the judgments and executions referred to in said findings. Said Flack and Dawson are engaged in an attempt to enforce satisfaction of their respective debts against McGarry out of the property of the appellant through a mere technicality of law. They are endeavoring to profit out of an unfortunate mistake, and rely upon the language of the statute governing attachment proceedings to enable them to succeed in their efforts. Section 150, Civil Code, provides that "from the date of the attachment until it be discharged or the writ executed, the plaintiff as against third persons shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached, subject to the conditions prescribed in the next section as to real property." Under this provision of the statute it is claimed upon the part of said Houser, Flack, and Dawson, that they occupy the same position with reference to said block as a purchaser thereof in good faith; and in consequence of its language, the said referee and circuit court found and determined that the appellant was entitled to no relief in the suit as against said parties. This decision left the appellant no alternative but to acquiesce in the sale of the block for the purpose mentioned, and be rendered liable upon her covenant of warranty contained in her deed to Mathews.

Opinion of the Court—Thayer, C. J.

The respondents did not allege in their answer that the attachment proceedings against said block were taken in good faith, nor attempt to prove it as a fact by any testimony whatever. The only ground upon which they claim to be deemed purchasers in good faith and for a valuable consideration of the property, is, that the said proceedings were duly instituted. If they had purchased the block from McGarry for a valuable consideration, and claimed by virtue of such purchase a right to it, to the exclusion of the equitable title which the appellant had therein, they would have been compelled to allege and prove that they had no notice whatever down to the time of the actual payment of the consideration of any such title, nor of the circumstances alleged in the complaint from which such notice could be inferred; and then they would only have established an equity in themselves equal to that in favor of the appellant, though their having the legal title would give them a superior advantage. The legal title, however, without being coupled with an equal equity, will not prevail over the equitable title. It seems to me that notwithstanding the language of the Code above set out, an attaching creditor, in order to be deemed a purchaser in good faith of the property as against one having an outstanding equity, must allege and prove all the facts necessary to establish that character of ownership in favor of a purchaser of such property as against such an equity. It can hardly be supposed that the legislature intended, by the provision of the Code referred to, to place an attaching creditor upon any more favorable grounds, with reference to his rights in the property attached, than those occupied by a purchaser of the property; nor to deem the former a purchaser in good faith except under the same circumstances in which the latter would be deemed such a purchaser. Any other view would lead to absurd consequences and occasion injustice. It would enable a party to cut off an outstanding equity by resorting to an attachment when he would not be able to accomplish it by a direct purchase of the property. Such a result was obviously not contem-

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plated by the adoption of the said provision of the Code. If this view be correct, it follows that the answer of the said respondents to the complaint in the suit was not sufficient to show that they were entitled to the standing of purchasers of the block in good faith. The answer filed by them does not contain any such defense, but confines itself strictly to a traverse of the appellant's allegations. If the respondents had desired to claim that they be deemed purchasers in good faith of the property, they should have averred the facts which, under the statute, would have constituted them such, in avoidance of the matters alleged in the complaint regarding the appellant's equity, and not have attempted to avail themselves of such defense by merely controverting those allegations. Such pleas were very common under the former equity practice. The defendant's statement therein was to the effect that the complainant may have had an outstanding equity in the property, but that the former had purchased it in good faith without notice of such equity, and that therefore the latter was not entitled to assert or claim the equity. The plea did not deny the fact that the complainant did not have the equity, but it barred his enforcement of it by alleging the new matter; and the same principle in pleading such matters exists now as formerly, although the system of pleading has materially changed.

The respondents in this case should have alleged the facts showing that the attachment proceedings were duly commenced upon a valid debt; that the block in question was duly levied upon by the sheriff under the said proceedings; that he made a certificate containing the title of the cause, the names of the parties, a description of the real property, a statement that the same had been attached at the suit of the plaintiffs therein, the date thereof, and that he had delivered such certificate to the county clerk of the county of Umatilla, and that the latter had duly filed and recorded it as provided in section 151, Civil Code, and that they had no notice or knowledge of the mistake in the deed from McGarry to appellant at the time such proceedings

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were taken and had. These facts, properly set forth in the answer, would doubtless have entitled the attaching creditors to claim, as against the appellant, that they were entitled to "be deemed purchasers in good faith and for a valuable consideration of the property attached." Instead, however, of pursuing that course, the respondents chose to stand upon a strict denial that such mistake was made. Nor do the proofs submitted at the hearing show facts sufficient to entitle the respondents to claim that they or either of them, under said provision of the Code, should be deemed purchasers of the said block in good faith. The attachment proceedings were not introduced in evidence, and there is nothing to show that any such certificate by the sheriff was delivered to the county clerk, or was filed or recorded by him as provided in said section 151, Code; which, according to said section 150, Code, is a condition to the plaintiff, in an attachment proceeding, being deemed a purchaser in good faith. The language of the latter section, as will be observed by reference to it, is: "The plaintiff, etc., shall be deemed, etc., of the property, real or personal, attached, subject to the conditions prescribed in the next section as to real property."

According to this view, the respondents Houser, Flack, and Dawson acquired no rights in the said block under the said attachment proceedings that were not subject to the equity of the appellant therein, whether the possession thereof by the appellant and her grantees was sufficient or not to impart notice to them of such equity. Their attempt, therefore, to sell the block under the said proceedings was a clear violation of the appellant's rights in the premises and contrary to equity and good conscience.

The decree appealed from will be reversed and a decree entered in this court in accordance with the prayer of the appellant's complaint; and the case be remanded to the said circuit court with directions to enter such decree as the decree of that court, and for such further proceedings as may be necessary to carry the same into effect.

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[Filed May 12, 1880.]

H. E. HOLMES, RESPONDENT, v. FRANCES E. PAGE,
APPELLANT.

ACCOUNT STATED—WHEN ASSENTED TO.—An account stated is an account which has been rendered by the creditor, and has been assented to by the debtor as correct, either expressly or by implication of law from failure to object.

ACTION FOUNDED ON THE CONSENT—NOT ON ITEMS.—The action is not founded upon the items of the account, but on the defendant's consent to the balance stated.

FAMILY EXPENSES—WIFE WHEN LIABLE.—Where goods are bought as family expenses and are so used, either husband or wife is liable in an action for them, but the wife cannot be made liable on a contract based on account stated between her husband and the plaintiff to which she has not assented.

APPEAL from Umatilla county: JAS. A. FEE, judge.

This is an action on account stated in which the defendants as husband and wife were sued jointly. The defendant Thomas P. Page made default, but his wife, the defendant Frances E. Page, answered for herself only. Upon issue being joined, after a trial, a verdict and judgment was rendered against the defendant Frances E. Page for the amount demanded, from which the present appeal is taken.

W. F. Butcher, for Respondent.

Ramsey & Wager and *Wm. Parsons*, for Appellant.

LORD, J., delivered the opinion of the court.

The balance on the account stated is alleged to have been due on an account for goods sold and delivered to the defendants for family use, but the record discloses that no accounting ever took place between the plaintiff and the defendant Frances E. Page in which a balance was found due which she agreed to pay. The action is not based upon the original indebtedness for goods sold and delivered by the plaintiff to the defendants for family use, but on an accounting which was had between the plaintiff and the husband of Frances E. Page, in which a balance was found due in the sum named, which he promised to pay. The question raised and to be determined is, whether the assent of the husband to a balance due on account stated binds the wife, the defendant Frances E. Page, with

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22 368
23* 961
25* 1088
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whom and the plaintiff no account was ever struck and balance found to be due which she undertook or agreed to pay. It arises out of the following instruction: "I instruct you that if you find that an account was stated with Thomas P. Page, and find that Thomas P. Page and Frances E. Page were husband and wife at the time the account was stated, or that they were husband and wife at the time the goods were purchased, then Frances E. Page was bound thereby." The effect of this instruction is to say that the assent of the husband is the assent of the wife, and binds her equally with him, so that if an account was stated between the plaintiff and the husband of the defendant which he admitted to be correct, that she is alike bound thereby, and precluded from making any defense that he could not make. An account stated is an account which has been rendered by the creditor, and has been assented to by the debtor as correct, either expressly or by implication of law from failure to object. *Hooker v. Owens*, 17 Or. 523.

The action is based on an agreement between the parties founded upon an examination of the transaction embraced, and has all the force of a contract. It is in the nature of a new promise, but the consideration of the promise is the stating of the account. As Searle, C. J., said: "The original account becomes the consideration for the agreement, and it is not necessary to prove the items of such account, nor can they be inquired into or surcharged except for some fraud, error or mistake, and such grounds, according to the weight of authority, must be set forth in the pleadings." *Auzerais v. Naglee*, 74 Cal. 64. The reason is that the action is not founded upon the items of the account, but on the defendant's consent to the balance stated. This agreed statement becomes an original demand, and is equivalent to an express promise to pay the actual sum stated which the creditor becomes entitled to recover. And as this is strictly an action on an account stated, the plaintiff must prove it as alleged in his complaint, and nothing short of such proof will support his

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allegation. *Volkering v. De Graff*, 81 N. Y. 271. Unless, therefore, the promise or assent of the husband of the defendant operates to bind and make her liable on the account stated, the plaintiff must fail.

Section 2874, Or. Code, provides that "the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto may be sued jointly or separately." Here the liability for family expenses is created against either husband or wife, or both, by the statute. Under this provision each is personally liable when the indebtedness is for the purposes contemplated by it. The fact that the goods sold were for the use of the family and were so used, but were charged to the husband individually, or that he may have given his note for the same, will not exonerate the wife from liability on the original indebtedness so long as such note remains unpaid. In *Black v. Sippy*, 15 Or. 575, the action was against the wife to recover money for goods and merchandise sold and delivered for the use of the family which had been charged to the husband, and who, on an accounting, had given his note to the plaintiff for the sum found due which the plaintiff then held and was unpaid, and the defence urged was that the acceptance by the plaintiff of the note of her husband was payment of the original indebtedness; but the court held that the changing of the form of the indebtedness as against him did not release her from liability under the statute to pay for such goods and merchandise incurred as a family expense. No claim was made that the wife was liable on the note, or that her husband in giving such note was agent for her. The action was based on the right given the creditor, and the liability declared by the statute against either or both for a debt for goods and merchandise incurred as a family expense. And, if this action was founded upon the original indebtedness for family expenses, the fact that the terms of such indebtedness had been charged to the husband, or that on an adjustment of such account a balance had been found due which

the husband had promised to pay, or for which he had given his note and which remained unpaid, would not defeat her liability for such indebtedness incurred as a family expense.

But the liability sought to be enforced in this action against the defendant is not on an account for goods sold and delivered to the defendant for family use, but it is based on the promise of the husband to pay the balance found to be due on such an account stated between the plaintiff and him on the theory that his promise or undertaking in relation thereto is the wife's, or that in such case he is agent for her, and his engagement alike binds her. It thus appears that the plaintiff is not seeking to enforce her liability under the statute, but on her husband's promise or contract to which she is not a party, or to which she has not assented. And, if she is bound, the plaintiff is not required to prove the items, and she is precluded, except for fraud or mistake alleged, from inquiring into their validity, whether they were bought for family use or not, or to make other defence. To so hold is to make her husband her agent against her will, and to enable him to bind his wife without her assent, express or implied. The principle is elementary that it is only the parties to a contract and their representatives that are bound by it. That a husband may be agent for his wife is not doubted; but, as has been said, "a husband has, by virtue of his relation alone, no implied power to act as agent of his wife in the transaction of her business. Whatever authority he exercises in that capacity must be derived from her prior appointment or subsequent ratification." *Mechem on Agency*, § 63. It is not disputed that if the goods were bought for family expenses and were used by the family but that the defendant is liable, but she cannot be made liable on a contract based on an account stated between her husband and the plaintiff to which she has not assented. It results that the judgment must be reversed and the cause remanded.

Statement of facts.

[Filed May 12, 1890.]

W. J. SNODGRASS, APPELLANT, v. W. H. ANDROSS
AND W. H. ANDROSS, JR., RESPONDENTS.

PLEADINGS—CONFESSION AND AVOIDANCE NOT INCONSISTENT.—Defenses in a pleading can only be adjudged inconsistent when they are so contradictory of each other that some of them must necessarily be false. Where a defendant in an answer denies positively the allegations of a complaint, and then pleads as a defense thereto new matter in the nature of confession and avoidance, the denial and new matter are not necessarily inconsistent with each other, as it is possible for both of them to be true.

APPEAL from Umatilla county: JAS. A. FEE, judge.

The appellant commenced an action against the respondents for the recovery of money. He alleged in his complaint that about April, 1883, he made an agreement with respondents to let to them 500 head of ewe sheep for the term of five years from August 1, 1883, for one-half of the wool and one-half of the increase, the respondents to be at the expense of feeding, herding and caring for the sheep during the term; that by reason of the fact that no lot of sheep could, at the time, be found satisfactory to the parties, the time for furnishing the sheep to respondents was extended by mutual agreement; that appellant, about June 1, 1884, in accordance with the agreement, furnished to respondents 600 head of ewe sheep, which were unsheared and had with them 427 lambs; that by reason of the fact of the sheep being unsheared and having with them the lambs, and of their having been fed and cared for from August 1, 1883, until the time of their delivery to the respondents, the appellant was compelled to pay for them \$1,200 more than their value would have been on August 1, 1883; that in consideration of the appellant's delivering to the respondents the said sheep unsheared, and of their having lambs, the latter agreed to pay the former the reasonable value for the herding, feeding and caring for them from said first day of August, 1883, to the time of their delivery, and that the reasonable value thereof was \$1,075, which sum the respondents had neglected and refused to pay. The complaint also contained two other

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causes of action, one of which was for furnishing pasturage for certain horses and cattle belonging to respondents during the years from 1883 to 1887, both inclusive, for which he claimed \$290. The other was the use of a stallion during the season of 1885, for which he claimed \$100.

Respondents filed an answer to the complaint in which they admitted the agreement wherein appellant was to let to them the 500 head of ewe sheep upon the terms mentioned in the complaint, and of the furnishing them the 600 head of unsheared sheep and their lambs, but denied that the time for furnishing said 500 head was extended by mutual agreement of the parties or by any consent or agreement of the respondents, or that in consideration of appellant's delivering to them said 600 head of sheep with their lambs, or otherwise, they undertook or agreed to pay appellant for herding, feeding or caring for said sheep from August 1, 1883, up to the time of said delivery, or for any other time, the sum of \$1,075, or any other sum. The respondents for a further defense to appellant's first cause of action, averred that in the fall of 1885 they fully paid the appellant all demands on account thereof by paying to him the sum of \$383.50, in full satisfaction and discharge of the same. And for a further defense thereto the respondents averred that in the year 1885 they and the appellant submitted said demand alleged in appellant's first cause of action, and other controverted matters, to the arbitration of certain persons chosen by them as arbitrators; that said arbitrators made and published an award that the respondents pay to appellant the sum of \$65, which they accordingly thereupon paid. The respondents denied that the appellant furnished them pasture for any horses and cattle during the several years alleged in the complaint or any time; and for further defense thereto averred that they and the appellant on the ninth day of April, 1883, agreed that for all pasturage appellant might furnish to respondents within five years thereafter the latter should not be required to pay any greater rate therefor than four dollars per annum for

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female stock and nothing for other stock, and that they had fully paid appellant for all pasturage so furnished. Respondents denied that appellant furnished to them at any time the use of a stallion. Respondents, by way of counter-claim, alleged that they pastured forty-seven head of cattle for appellant from August 10, 1886, to December 28, 1886; that they wintered a steer for him during the winter of 1886 and 1887; that at his instance and request they paid out and expended for him the sum of \$38 for threshing his grain in the year 1886; that the pasturage of the cattle and wintering of the steer were reasonably worth the sum of \$245.

The appellant filed a reply to the new matter contained in the answer, denying the same. He averred that the parties submitted the matters set out in the first count of his complaint to arbitration; but alleged that the arbitrators awarded that the respondents pay to him, in full satisfaction of all demands then submitted, the sum of \$383.50; that appellant agreed to accept that sum, but that the respondents refused to pay it or any part thereof. The appellant, in effect, admitted in his reply that respondents pastured the forty-seven head of cattle in the year 1886, but claimed that they only pastured them about two months, and that the pasturage was upon the lands of appellant which were leased to respondents and was not worth more than \$47; also admitted the wintering of the steer, which he claimed was not worth more than \$5.

The action was tried by jury, who returned a verdict for the respondents, and upon which the judgment appealed from was entered.

B. J. Slater, for Appellant.

J. C. Leasure, for Respondents.

THAYER, C. J., delivered the opinion of the court.

It appears from the bill of exceptions settled and signed in this case that the appellant, at the trial of the action in the circuit court, gave testimony tending to prove the

allegations contained in his complaint and thereupon rested; that the respondents then offered testimony contradicting that given by the appellant, to which the appellant's counsel objected upon the grounds that it was irrelevant, immaterial, incompetent and contrary to the admissions of respondents in their pleadings. Said counsel also objected to the respondents giving evidence tending to prove the allegations of new matter contained in their answer. The circuit court overruled these various objections and the appellant's counsel saved exceptions to the rulings, which present the only questions for our consideration herein.

The theory of the appellant's counsel is, that the defenses of payment, settlement, arbitration and award and payment of the award, set forth in the respondents' answer to the complaint in the action, are inconsistent with their denials in the answer. He also claims that the respondents' admission in the answer that they received the sheep under the agreement alleged in the complaint to have been entered into between the parties about April, 1883, was inconsistent with their denial that they agreed to extend the time for the furnishing of the 500 head of ewes. The counsel's contention is, that a defense in the nature of a confession and avoidance cannot be united with an absolute denial of the matter which it is intended to answer. Where a defendant in an answer to a complaint positively denies the facts alleged therein from which the plaintiff claims an indebtedness against him, and in the same answer pleads payment of the debt, an accord and satisfaction of the claim, or that it is barred by the statute of limitations, or any other defense which in effect confesses that the debt had existed against him, such pleas have the appearance of being inconsistent with the denial. The Code, however, permits a defendant to plead as many defenses as he may have; and unless the court can see from an inspection of them that they are necessarily inconsistent with each other and cannot all be true, it has no authority to interfere with the party's right to unite them in the same pleading. In this

Points decided.

case the circuit court could not have determined that the defenses contained in the answer were not all true. The respondents may never have agreed to pay the appellant for herding, feeding and taking care of the sheep and lambs delivered to them and yet they may have paid him for so doing. They may have agreed with the appellant to submit his said claim to arbitration and have paid the award made by the arbitrators thereon without having been originally liable for its payment.

We are of the opinion that the circuit court committed no error in admitting the testimony excepted to by the appellant's counsel.

The judgment appealed from will be affirmed.

[Filed May 16, 1890.]

**RASMUS LARSEN, RESPONDENT, v. THE OREGON
RAILWAY & NAVIGATION COMPANY,
APPELLANT.**

ANSWER—FAILURE TO REPLY TO NEW MATTER.—By failing to reply to new matter in an answer, every material fact that is well pleaded therein stands admitted, but legal conclusions need not be denied.

RAILROAD—RIGHT OF WAY THROUGH THE PUBLIC LANDS OF THE UNITED STATES—ACT OF MARCH 3, 1875.—To entitle a railroad company to a right of way through the public lands of the United States as against one in possession of such lands, it must appear that such railroad company complied with the act of congress of March 3, 1875,—that is, it must have filed with the secretary of the interior a copy of its articles of incorporation and due proof of its organization under the same, and it must also have claimed the benefits of said act by filing with the register of the land-office of the proper district a profile of its road.

HOMESTEAD SETTLER—PUBLIC LANDS OF THE UNITED STATES.—When a homestead claimant settles upon the public lands of the United States, and in due time files upon said homestead claim as required by the act of congress granting homesteads to actual settlers upon the public lands of the United States, said homestead claim thus becomes separated from the public domain and ceases to be public lands of the United States, and thereafter a railroad company, by complying with the act of March 3, 1875, does not acquire a right of way through the homestead claim of such settler; *held, further*, that the act of congress of March 3, 1875, does not purport to grant a right of way through the claim of those who had prior to the time such right attached acquired possessory rights in such public lands, and that by the third section of the act such rights are only to be taken by condemnation.

TRAMP—CONSTRUCTION OF A RAILROAD THROUGH ONE'S LAND WITHOUT HIS CONSENT—MEASURE OF DAMAGES.—When a railroad company, without the consent of the owner of land, constructs its road over and across such owner's land and runs its cars thereon and no special damages are alleged, the correct measure of dam-

19 240
19 463
22 190
23* 974
29* 663
29* 556

19 240
24 187
24 308
23* 974
33* 530
33* 569

19 240
35 297

19 240
39 69

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ages is the difference between the annual rental value of the premises with the railroad track down and the road operated as it is, and what the rental value of the premises would have been if the road had not been there; and when it also appeared that the defendant, in effecting an entry, broke the plaintiff's close, but no special damages are alleged, the measure of damages for such breaking would be such sum as would restore the premises to such a condition of safety for use as they were in before such breaking.

INSTRUCTIONS—PROVINCE OF THE COURT AND JURY.—When an instruction otherwise proper was asked by the defendant, but said instruction in effect submitted to the jury to find from the pleadings what was and what was not specially pleaded, its refusal was not error. It is the province of the court to declare what are the issues to be tried and to construe the pleadings, and of the jury to find the facts. The instruction refused submitted matters of law to the jury the decision of which properly belonged to the court.

INSTRUCTION—REFUSED—ERROR.—When there was no allegation of special damages the refusal of the court to give this instruction was held erroneous: "The plaintiff having neither pleaded nor proved any special damages resulting from the alleged frightening of his horses, he can recover nothing from that cause."

APPEAL from Gilliam county: J. H. BIRD, judge.

This is an action for trespass alleged to have been committed by the defendant on the plaintiff's lands in Gilliam county, Oregon. The complaint alleges, in substance, that on the first day of May, 1888, the plaintiff was the owner and in the possession of certain real property mentioned in the complaint, and that while the plaintiff so owned and possessed said lands, the defendant wilfully, unlawfully, and with force and arms, broke his close and entered said premises, and that said defendant at said time broke down a fence enclosing a portion of same, and did so wrongfully, wilfully and unlawfully without plaintiff's consent and against his will, then and there construct and build a railway over, through and across said premises; that defendant has, since said March 1, 1888, and up to the date of the filing of this complaint, maintained, used, occupied and operated said road over, across and through said premises and continuously run trains upon same, whereby plaintiff was prevented from using, occupying and enjoying his said premises as fully as he might otherwise have done, and whereby plaintiff's horses were prevented from watering at their usual and customary watering-place upon said premises, all to the damage of the plaintiff in the sum of \$1,000, for which sum he demands judgment, etc.

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The answer denies the allegations of the complaint except it admits that it built and operated its railroad across said premises as alleged. By way of separate defense the answer alleges that on the first day of May, 1888, the tract of land described in the complaint and continuously since that time was and is public land of the United States; that in pursuance of the provisions of an act of congress, entitled, "An act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875, the defendant duly acquired a right of way upon and over said land for its railroad extending from Heppner in Morrow county, Oregon, to a point of junction near Willows, in Gilliam county, Oregon, with the main line of the defendant's railroad from Portland, Oregon, to Umatilla Junction in said State; that about the month of July, 1888, the defendant lawfully entered into and took possession of a strip of land, embraced within and constituting a part of the tract in the complaint described, for said right of way for its said railroad and has been in continuous possession thereof to the present time; that during the time it has been so in possession, the defendant has constructed upon said right of way a railroad which forms a part of its said line from Heppner to said point of junction with said main line, and that since the first day of December, 1888, the said defendant has been running trains of cars upon and over its said railroad, and did so run its cars upon and over the same, and on the twenty-eighth of December, 1888, which said running of said cars is the supposed trespass mentioned in the complaint.

To this answer no reply was filed. The remaining facts appear in the opinion.

W. W. COTTON, for Appellant.

A. S. BENNETT, for Respondent.

STRAHAN, J., delivered the opinion of the court.

In disposing of this appeal it will be most convenient to first consider the new matter in the answer, and then to

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refer to the exceptions taken upon the trial, for the reason that if the answer contains sufficient to give the defendant a right of way over the land in controversy, the judgment would have to be reversed as there is no reply, and whatever facts contained therein which are well pleaded, stand admitted on the record.

1. The appellant claims that the act of congress of March 3, 1875 (18 Stats. at Large, 482), granted to it the right of way through the lands in controversy. So much of that act as is material is as follows: *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* Section 1. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the congress of the United States, which shall have filed with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad; also grounds adjacent to such right of way for station buildings, depots, machine-shops, side tracks, turn-outs and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of road.

Sec. 2. That any railroad company whose right of way, or whose track or road-bed upon such right of way passes through any cañon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said cañon, pass or defile for the purpose of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any cañon, pass or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or

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highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any cañon, pass or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favored location, and in as perfect a manner as the original road; *provided*, that such expense shall be equitably divided between any number of railroad companies occupying and using the same cañon, pass or defile.

Sec. 3. That the legislature of the proper State or Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act, entitled, "An act to amend an act entitled an act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes, approved July 1, 1862," approved July 2, 1864.

Sec. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land-office for the district where such lands are located a profile of its road; and upon approval thereof by the secretary of the interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; *provided*, that if any section of road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

It is, in effect, claimed by the appellant that the grant made by the first section of the act operates in favor of all

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railroads passing through any lands of the United States, notwithstanding the same may have been taken as a homestead, which shall locate its line of road across said land at any time before a patent shall be issued for the same. In other words, that a homestead continues to be "public lands of the United States" until a patent issues to the homestead claimant. It may be well doubted whether this question is presented by this record, for the reason that it does not appear that the appellant has filed with the secretary of the interior a copy of its articles of incorporation, and due proof of its organization under the same, as required by the first section of the act, nor does it appear that it ever claimed the benefits of said act as required in the fourth section, by filing with the register of the land-office of the proper district a profile of its road, or that the same was ever approved by the secretary of the interior.

These are plain requirements of the act, and without entering at large upon their discussion at this time, I think it sufficient to say that before the appellant could acquire any rights under the act as against one in possession of the land in question, it must show a compliance with its terms. But it is claimed by the appellant that the allegations in the answer, that the defendant lawfully entered into and took possession of a strip of land embraced within and constituting a part of the tract in the complaint described for said right of way for its said railroad, and that it did this in pursuance of the act of congress referred to, shows a compliance with said act; but this would be enlarging and extending the allegations of the answer far beyond their scope. Not only so, but the answer is bad in substance in failing to allege what the defendant company did by way of compliance with said act. It alleges nothing but legal conclusions. In such case, where the right claimed depends entirely on the existence of facts which are not disclosed, the simple fact that the party claimed the right is no evidence of the existence of the necessary facts to confer it. But there is

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one other objection, which, owing to its importance, I think proper to notice. It appears from the bill of exceptions that the plaintiff settled on the land in controversy as a homestead in the month of December, 1886, or January, 1887, and that in the month of February, 1887, made the necessary filing in the proper land-office of his said settlement and claim.

Inasmuch as no patent had been issued for said land and the plaintiff's right thereto was still possessory, the five years not having expired from the date of the commencement of his residence, the appellant claims that at the time of its entry thereon the same was public land and within the power of congress to dispose of as it might think fit, and that the grant made by said act of March 3, 1875, is such disposition, and counsel cites the Yosemite Valley case, 15 Wall. 77, and *Frisbie v. Whitney*, 9 Wall. 189. Waiving for the present the particular objections to the defendant's claim already pointed out, I do not think the authorities cited support the defendant's contention. I have no doubt that, when, in compliance with the act of congress granting homesteads to actual settlers upon the public lands of the United States, a person qualified under the act makes a settlement thereon and then complies with said act, the land claimed by the settler ceases to be public lands of the United States, and that congress has not the power, without the consent of such settler, to appropriate said lands to any other public use whatever, nor has it in this instance assumed to exercise such authority. Such settlement and compliance with the act severs the land claimed as a homestead from the mass of public lands, and it is taken out of the act of congress of March 3, *supra*. This is the effect of the doctrine of *Wilcox v. Jackson*, 13 Peters, 498, and *Hastings & D. R. R. Co. v. Whitney*, 132 U. S. 357; and such is the construction given to this act in *Red River L. R. R. Co. v. Sture*, 32 Minn. 95. And this conclusion seems clearly deducible from the act itself for the reason it does not assume to grant the *possessory claims* of those who had acquired them prior to the time of com-

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pliance with the act by a railroad company claiming the benefit of the act for the reason that the third section of the act provides for the condemnation of such *possessory claims*. This provision is a clear recognition of such claims as against any corporation claiming by title subsequent to their acquisition. But counsel contend that these views cannot be correct for the reason the United States have in a large number of cases maintained actions of trespass against homestead claimants for cutting timber off the lands claimed by them, and he cites *U. S. v. Taylor*, 35 Fed. Rep. 486, *U. S. v. Stores*, 14 Fed. Rep. 824, *U. S. v. Smith*, 11 Fed. Rep. 487, and *U. S. v. Cook*, 19 Wall. 591. It is true that after settlement by a homestead claimant and his incipient compliance with the act, his title is inchoate; he has that which will ripen into a perfect title by a complete compliance with the act, and in the meantime he is in under the right which has been conferred upon him by the United States. Neither the right to destroy the timber growing upon the land nor to use it for speculative purposes is conferred, and should he transcend the power conferred upon him by his grantor before his title has matured and become perfect, no reason is perceived why he might not be required to respond in damages for an act which is, in its nature, waste.

2. It appeared upon the trial in the court below that the plaintiff's entire claim was worth from \$800 to \$1,200. The jury gave him a verdict of \$600 damages. A motion was made for a new trial, which was overruled by the court, in passing upon which the learned circuit judge said: "I am satisfied that in all cases where a corporation is a party, that more or less prejudice exists, sometimes for, but more frequently against, the corporation; and that juries frequently render unjust verdicts in such cases. In this case I am satisfied that the jury were prejudiced and that the verdict is excessive, but I do not know it, and therefore overrule the motion for a new trial." It would seem that this was enough to have given the defendant a new trial under subdivision 5 of section 285, Hill's Code.

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That provision allows a new trial when excessive damages have been allowed, appearing to have been given under the influence of passion or prejudice; and while the finding of the court brings the case substantially within the provision, he saw proper to disallow the motion for a new trial, and we will not interfere with the action of the court in this particular case, for the reason that a new trial must be awarded for other reasons presently to be adverted to. Still, I am strongly inclined to think that when it does appear from the record that the damages are excessive, and when passion or prejudice influenced the jury in reaching the conclusion, the party injured is entitled to a new trial as a legal right, and to refuse it is reversible error. These facts would very rarely appear in the record as they do in this case. But while we have determined not to award a new trial in this case on account of such excessive damages and prejudice found by the court, their existence makes it all the more imperative on this court to look carefully into the record so far as errors are assigned, to ascertain if any errors occurred at the trial prejudicial to the appellant.

3. In this case no special damages are alleged. The plaintiff was therefore only entitled to recover such damages by reason of the unauthorized laying of the defendant's railroad track across his premises and the operation of the road as well as the actual damages he sustained by the breaking of his close. In such case the correct measure of damages is said to be the difference between the annual rental value of the premises with the railroad track down and operated as it is, and what the rental value of the premises would have been if the road had not been there. *Blesch v. The Chicago and Northwestern Railway Co.*, 43 Wis. 183. Of course this rule would not include special damages in a case where such damages are pleaded, and in this case it does not include the damages for the breaking of the plaintiff's close; but the latter item would only be such sum as would restore the premises to such a condition of safety for use as they were in before the breaking. No

special damages are alleged, and therefore none are recoverable.

The general tenor of instructions one and two, which were asked by the defendant and refused by the court, is in harmony with what is here said, and the substance ought to have been given, but in the particular form in which they were asked they left it to the jury to find out what was or was not specially pleaded. This was the province of the court and it did not err in refusing to give an instruction, which, in effect, left that question to the jury. But the defendant also asked the court to give the jury the following instruction, which was refused: "The plaintiff having neither plead nor proved any special damages resulting from the alleged frightening of his horses, he can recover nothing from that cause." This instruction was refused, and such refusal was clearly error. It impliedly conceded more to the plaintiff than he was entitled to; that is, it seems to assume that if the plaintiff had alleged and proved something of that kind it would have formed a proper basis for a recovery, which may well be doubted. But whether that is so or not, such a claim was not included in the pleadings and could not be considered by the jury. Evidence which was properly excepted to was also allowed to go to the jury on this subject, which was also error. The case seems to have been tried, so far as appears, without any very definite rule as to its scope under the pleadings or the measure of damages, and entirely at variance with what is here said.

The judgment appealed from will therefore be reversed and the cause remanded to the court below for a new trial.

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[Filed May 17, 1890.]

J. L. SPERRY & CO., APPELLANTS, v. H. P. LEWIS,
RESPONDENT.

PROMISSORY NOTE—CONTRACT TO DELIVER WOOL.—In an action on a promissory note which had appended to it on the same sheet of paper an agreement by the maker to deliver his entire wool clip for a particular year as security for the note, and which provided that the plaintiffs were to sell the same on commission and apply the proceeds in payment of said note; *held*, that a complaint which was sufficient in every other particular, but did not allege that the defendant failed to deliver the wool, or that it was insufficient to pay the debt, was good on demurrer.

APPEAL from Union county: J. A. FEE, judge.

This is an action founded on two promissory notes, which are alike in every particular except as to amounts, time of payment, dates, etc. One is for \$1,000, upon which a payment of \$1,036.32 is indorsed, and the other is for \$150. Each bears interest at the rate of ten per cent per annum until paid, and each note is past due. At the foot of each note and on the same piece of paper is the following writing signed by the defendant: "The above being an advance on ——— entire wool clip for 188—. In consideration thereof ——— agree to consign to said J. L. Sperry & Co. in Portland, Oregon, as soon as shorn, the whole of said wool clip from all sheep owned or controlled by ———, numbered ——— head; said wool to be held by said company as security for this and every other obligation of the undersigned to said company, and to be sold by said company for ——— on account on commission under ——— instructions; the proceeds of such sale to be applied, first, to any obligation secured hereby, and the overplus to be paid over to the undersigned."

A general demurrer was sustained to the complaint, and the plaintiffs not wishing to amend their complaint; final judgment was rendered against them, from which this appeal is taken.

J. W. Shelton, for Appellants.

Cage Baker, for Respondent.

Points decided.

STRAHAN, J., delivered the opinion of the court.

There is no defect in the complaint, except the respondent claims that the note and the writing appended to it are to be construed together and constitute one entire contract; and that before the plaintiff can recover he must show by his pleading that the wool specified in the contract was not delivered or that the same was insufficient to pay the debt; but in this counsel is evidently mistaken. The obligation to pay created by the note is unconditional and absolute, and the most that can be said for the writing appended to it is that the defendant promised to give a particular security from which an amount of money was expected to be received by the plaintiffs sufficient to pay the note. It was the defendant's duty to consign his wool clip to the plaintiffs, and until he did so, no duty devolved on the plaintiffs whatever. The complaint alleges the notes have not been paid except a particular sum on one of them, and the demurrer admits the facts. Under this state of the record it was clearly error to sustain the demurrer.

The judgment appealed from will, therefore, be reversed and the cause remanded to the court below with directions to overrule the demurrer, and for such further proceedings as may be proper.



[Filed May 19, 1890.]

19	251
29	189

**J. F. STOUT, RESPONDENT, v. WATSON & LUHRS AND
GEORGE HERBERT, APPELLANTS.**

ASSIGNMENT FOR THE BENEFIT OF CREDITORS DEFINED.—A voluntary assignment for the benefit of creditors implies a trust and contemplates the intervention of a trustee. When a creditor, under an agreement with the assignor to sell the property and to apply the proceeds to the payment of his own and other debts of his assignor and refund the surplus, he becomes a trustee and the transaction amounts to a voluntary assignment.

ASSIGNMENT—SALE.—Sales are transfers in the ordinary course of business; assignments commonly grow out of the embarrassment or suspension of business.

CASE IN JUDGMENT.—When H. & K. were about to be sued for a debt which they were unable to pay when it was due, made and delivered to the plaintiff a writing whereby they purported to transfer to him certain property which was nearly all

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they possessed, and by the terms of the writing the plaintiff was to pay himself and the men who had been working for H. & K. about the mill, and the residue to be applied on the debt of T. & B.; *Add*, that the same was an assignment for the benefit of creditors, and not being for the benefit of all the creditors of H. & K., the same was avoided by section 3173, Hill's Code.

APPEAL from Wasco county: J. H. BIRD, judge.

This is an action of replevin to recover certain specific personal property alleged to be of the aggregate value of \$1,334.96 and for \$466 damages for the wrongful taking and detention thereof. The plaintiff recovered a verdict for \$1,037.93 damages, upon which judgment was entered, from which the defendants have appealed. The answer alleges in substance that the property in controversy at the time of said alleged taking was the property of T. A. Hudson and C. L. Kelsey, doing business as partners under the firm name of Hudson & Kelsey; that on the twenty-first day of October, 1887, Hudson & Kelsey were indebted to the defendants Watson & Luhrs in a large sum of money, and that they commenced an action in the circuit court of Wasco county against Hudson & Kelsey to recover the same, in which action a judgment was duly rendered and given in their favor and against said Hudson & Kelsey about the twentieth of December, 1887, for \$569.30 and costs and disbursements taxed at \$36.20; that during the pendency of said action and before judgment the plaintiffs duly caused a writ of attachment to be issued therein and placed the same in the hands of the defendant George Herbert, who was at said time the sheriff, for service, and that said sheriff, by virtue of said writ of attachment, on the twenty-fourth day of October, 1887, attached and seized all of the property in controversy, and after the entry of judgment, by virtue of an execution duly issued thereon, he duly sold all of said property and applied the proceeds on said execution, and that the same was insufficient to satisfy said execution.

J. J. Balleray, for Appellants.

F. P. Mays, for Respondent.

STRAHAN, J., delivered the opinion of the court.

The only questions presented for review on this appeal, material to be noticed, are presented by the instructions which the defendant requested at the trial and which were refused by the court. The plaintiff testified without objection, among other things, as follows: I know all about the property described in the complaint; on October 22, 1887, it belonged to Hudson & Kelsey; it was sold to me October 22, 1887; I believe I owned it on October 24th; I came by it by bill of sale given by Hudson & Kelsey; the bill of sale is in writing; it was transferred to me on the twenty-second day of October, 1887; on the morning of the twenty-second Mr. Hudson, accompanied by Mr. McAllister, came down to the mill; Hudson came into the engine room and called me out and gave me the bill of sale; I took it and read it; I asked him how much the indebtedness to the men amounted to; he told me he did not know exactly, but he thought about \$650; he then said he wanted me to take the bill of sale and the property and pay myself and the men; I told him I would do it; he referred to the men in the mill; it is stated in the bill of sale; I did not know exactly who they were or how much was owing. After describing the property and giving other testimony not necessary to be noticed, the witness further testified that he had no other agreement except what was contained in the bill of sale, and that was all the agreement he ever had with Hudson, and that there was no agreement outside of the bill of sale. The writing called a bill of sale was then offered in evidence and is as follows:

“Know all men by these presents: That, in consideration of a large sum of money due him from us as wages for engineer in the saw-mill operated by us near Wyeth station, Wasco county, Oregon, and the further consideration of his assuming and agreeing to pay to the several workmen in said mill the wages due them by us, and the further consideration of his assuming and agreeing to pay to Tatum & Bowen, of Portland, Oregon, such portion of the amount due to them by us for machinery and material purchased by

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us for use in connection with said mill as shall remain to him after paying the above-mentioned claims, we do hereby grant, sell, transfer and deliver unto John Stout, his heirs, executors, administrators and assigns, the following goods and chattels, viz: All the railroad cross-ties now at the said saw-mill, amounting to about 3,000; also all the lumber, amounting to about 30,000 feet; also all the slab wood, amounting to about 200 cords, and also all the saw logs, amounting to about 50,000 feet, and also all other material now at said mill. To have and to hold all and singular the said goods and chattels forever. And the said grantors hereby covenant with the said grantee that they are the lawful owners of said goods and chattels; that they are free from all encumbrances; that they have good right to sell the same as aforesaid, and that they will warrant and defend the same against the lawful claims and demands of all persons whatsoever. In witness whereof, the said grantors have hereunto set their hands this October 21, 1887.

“Witness:

“HUDSON & KELSEY.

“FRANK CLOUTMAN.”

At the conclusion of the evidence the defendants' counsel asked the court to give these two instructions, which were refused and exceptions duly taken: “1. The written instrument introduced in evidence in this cause purporting to be a bill of sale from Hudson & Kelsey to the plaintiff is not and did not make an actual sale from Hudson & Kelsey to said plaintiff, but was an assignment to him for the benefit of creditors. 2. Under the evidence in this case, the plaintiff has shown no title to the property sufficient to sustain a recovery in this cause, and you should therefore find for the defendant.”

These instructions present substantially the same question, and that is, whether the writing offered in evidence is a bill of sale vesting title to the property in controversy in the plaintiff or an assignment for the benefit of the creditors of Hudson & Kelsey.

1. The appellants' contention is that the writing referred

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to in the first instruction refused, is a voluntary assignment made by Hudson & Kelsey for the benefit of a part only of their creditors, and that not being for the benefit of all their creditors, it is void under the statute. Burrill on Assignments, § 3, says: "A voluntary assignment for the benefit of creditors implies a trust and contemplates the intervention of a trustee. * * * Assignments may be made to the whole body of creditors or to particular creditors or they may be of all or a part of the debtor's property; but unless a trust is thereby created by the assignor in favor of creditors, such instruments are not within the class of instruments known as assignments for creditors." Further: "And when the creditor undertakes, under an agreement with the assignor, to sell the property and apply the proceeds to the payment of his own and other debts of his assignor and refund the surplus, he becomes a trustee and the transaction amounts to a voluntary assignment." *Truitt v. Caldwell*, 3 Minn. 364; *Page v. Smith*, 24 Wis. 368. And it was held in *Murphy v. Caldwell*, 50 Alab. 461, that when a debtor made an absolute conveyance of all his property to one of his creditors in consideration of his grantee's paying certain other creditors, the same was a general assignment. The distinctions between an assignment and a sale are too marked to be misunderstood. Sales are transfers in the ordinary course of business; assignments commonly grow out of the embarrassments or suspension of business. A sale is usually for a consideration actually paid, or agreed to be paid, and created or passing simultaneously; an assignment is, in most cases, for a consideration already executed, as for a precedent or subsisting debt. Burrill on Assignments, § 4. These citations sufficiently show the nature of an assignment and the differences between an assignment and a sale; and applying what is laid down as elementary law by this author to the instrument offered in evidence in this case, there is no mistaking its character. It was made to one creditor for his own benefit and the other laborers in the mill with a residuary clause in favor of Tatum & Bowen.

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The plaintiff was made trustee of the property conveyed, with power to convert it into money and pay his own debt, and the debts of the other creditors provided for in the assignment. In addition to this, there had been no negotiations whatever between the plaintiff and Hudson & Kelsey before the instrument was executed. In fact, the first notice the plaintiff had of the so-called purchase, Hudson came down and called him out of the engine room, explained to him the nature of the instrument and asked his consent thereto. The action which resulted in a judgment against Hudson & Kelsey was then impending and they knew it. We therefore think the instrument under which the plaintiff claims title was an assignment and not a bill of sale.

2. But a valid assignment passes the title to the assignee as effectually as a bill of sale, and such was the effect of the instrument referred to unless the same is void under the statute. Section 3173, Hill's Code, provides: "No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective claim." The evidence shows conclusively that Hudson & Kelsey were insolvent at the time they made this assignment; that is, they were not able to pay their liabilities as they matured in the ordinary course of business, and it tends very strongly to prove that the assignment was made in contemplation of insolvency. Mr. Hudson testifies that at the time he made the instrument in question he knew that the plaintiffs were going to sue his firm, but he did not know that they were going to attach. Watson & Luhrs' debt was due and their debtors had no money wherewith to pay it. The obvious import of the transaction is that Hudson & Kelsey had become involved beyond their ability to pay, and knowing that Watson & Luhrs were about to endeavor to enforce the collection of their claim by law, H. & K. wished to give a preference to the laborers who had remained with them and assisted them in their business in the hope, and no doubt under the

promise, that their claims should be met. This instrument was executed in furtherance of that purpose, and, independently of the statute, it was a worthy one. Its object was to give the day laborer his wages; but, however honest the intent or worthy the purpose, an instrument executed in violation of the statute or contrary to its provisions must fail. The court has no power or discretion in such case. The two instructions above set out were correct statements of the law as applied to the facts of this case and should have been given. It is true they would have precluded recovery by the plaintiff, but that arose out of the inherent weakness of his case.

3. And this reminds us that at the close of the plaintiff's evidence the defendant moved for a non-suit, which was refused, to which an exception was taken. This motion should have been allowed. The plaintiff had no other evidence whatever of his title to the property in controversy except this assignment, which we have already indicated was void under the statute.

In this case it appears that the property in controversy was sold by Herbert as sheriff before the commencement of the action and the proceeds applied on the execution. None of the defendants being actually in possession of the property when the action was commenced, would replevin lie in any event? The question is not made in the record and we make no decision upon it. Wells on Replevin, § 134. So Watson & Luhrs never had possession of the property. The sheriff took it under their attachment and sold it for their benefit under a regular execution. Did that subject them to this action? Wells on Replevin, § 142.

The judgment will be reversed and the cause remanded to the court below with directions to sustain defendant's motion for a non-suit.

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[Filed May 19, 1890.]

STATE OF OREGON, RESPONDENT, v. HENRY WRIGHT
AND JAMES ALLEN, APPELLANTS.

INDICTMENT—WHEN SUFFICIENT UNDER SECTION 1270, HILL'S CODE.—Under this section when the forms of indictment given in the appendix to the Code are inapplicable, other forms, as nearly similar as the case will permit, may be used.

BURGLARY—INDICTMENT UNDER SECTION 1760, HILL'S CODE—NAME OF THE OWNER OF THE HOUSE BROKEN NOT GIVEN IN THE INDICTMENT.—Form No. 13 given in the appendix to the Code is for the crime of burglary defined by section 1758 and is sufficient though it does not give the name of the owner of the building. An indictment for burglary under section 1760, otherwise sufficient, which does not give the name of the owner of the building broken and entered, is sufficient under section 1270 of the Code. Such an indictment is as nearly similar to the form given in the appendix to the Code as the nature of the case would permit.

APPEAL from Union county: JAS. A. FEE, judge.

The grand jury of Union county, Oregon, returned into court the following indictment, omitting the caption and introductory part: "Henry Wright and James Allen are accused by the grand jury of the county of Union, and State of Oregon, by this indictment, of the crime of burglary, committed as follows: The said Henry Wright and James Allen, then and there, acting together, on the twenty-eighth day of November, A.D., 1888, in the county of Union and State of Oregon, unlawfully, feloniously and burglariously broke and entered a granary, the same being then and there a building in which there was at the time property kept, to wit, wheat, the same being then and there the personal property of one John N. Smith, with the intent then and there and thereby they, the said Henry Wright and James Allen, the said wheat so kept, in said granary as aforesaid, unlawfully and feloniously to take, steal and carry away, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

"Dated at Union, in the county aforesaid, this twenty-sixth day of September, A.D., 1889.

"J. L. RAND, district attorney."

The defendants were duly tried thereon and found guilty by a jury and sentenced to the penitentiary for the

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term of three years each. After their conviction and before sentence they moved an arrest of judgment for the reason the name of the owner of the building alleged to have been broken by them is not stated in the indictment. This motion was overruled by the court, to which an exception was taken, and that presents the sole question on this appeal.

T. H. Crawford, for Appellants.

J. L. Rand, district attorney, and *J. J. Balleray*, for Respondent.

STRAHAN, J., delivered the opinion of the court.

The motion to arrest the judgment made by the appellants presents but one question and that is the sufficiency of the indictment. The point of objection is that in an indictment for the crime of burglary the ownership of the building broken must be alleged. To support this contention counsel for appellants cites these authorities: 1 Bishop's Cr. Pr., §§ 137, 573, 586; *Com. v. Ferris*, 108 Mass. 1, 3; *State v. Brant*, 14 Iowa, 180; *Peels v. State*, 5 Am. Cr. R. 96; *Beall v. State*, 53 Ala. 460; *State v. Fockler*, 22 Kan. 542; *State v. Morrissey*, 22 Iowa, 158; *Wallace v. State*, 63 Ill. 451; *Jackson v. State*, 55 Wis. 589. There is no doubt of the common law rule, and that these authorities correctly declare it; and if the principle is unaffected by our Code of Criminal Procedure, the judgment appealed from is erroneous and must be reversed.

Section 1269, Hill's Code, gives a general form of indictment, which may be readily varied by the prosecutor without changing its substance, so as to reach any crime defined and made punishable by the Code; and section 1270 is as follows: "The manner of stating the acts constituting the crime, as set forth in the appendix to this Code, is sufficient, in all cases when the forms there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit."

Turning to the appendix we find but one form given for the crime of burglary, which is No. 13, and is as

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follows: "Broke and entered in the night-time, a dwelling-house, in which there was at the time a human being, namely, one C. D. (or whose name is unknown to the grand jury, as the case may be), with intent to commit larceny (or other crime, describing it generally) therein, by forcibly bursting or breaking the wall (or an outer door or a window, or shutter of a window) of such house (or as the case may be)."

This form is for the crime of burglary defined by section 1758, Hill's Code, which is for breaking and entering such dwelling in the night-time with a particular felonious intent or the commission of certain acts therein after entry. Section 1759 declares the same acts punishable when committed in the day-time, and the punishment is graded to about one-third less punishment than the preceding section.

Section 1760 defines the crime for which the appellants were convicted. It provides: "If any person shall break and enter any building within the curtilage of any dwelling-house, but not forming a part thereof, booth, tent, railway car, vessel, boat or other structure or erection in which any property is kept, with intent to steal therein, or to commit any felony therein, such person shall be deemed guilty of burglary, and punished by imprisonment in the penitentiary not less than two nor more than five years."

It will be observed that the form of indictment for burglary under section 1758 does not give the name of the owner of the building charged to have been broken and entered. Under the language of the Code, and the repeated decisions of this court, such an indictment would be held good in this State, and I think we are bound to give some effect to the latter part of section 1270, *supra*, and to hold an indictment good when no form is given in the appendix, but where the form actually used is as nearly similar to the forms given in the appendix as the nature of the case would permit. It was not claimed in this case that the form of this indictment was not as nearly similar to the form given in the appendix as the nature of the case

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would permit, or that its form was objectionable in any way except in the particular pointed out.

Within the principle of the Code referred to, we think the indictment was sufficient and that the court did not err in overruling appellants' motion in arrest of judgment. The judgment must therefore be affirmed.

[Filed May 19, 1890.]

JOHN WEIDERT, RESPONDENT, v. STATE INSURANCE CO., APPELLANT.

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30	347

CONTRACT OF INSURANCE—PRINCIPAL AND AGENT.—Contracts of insurance must have effect like all other written contracts. The intention of the parties must govern and control, and when the language used is plain and unambiguous, the intention of the parties to the contract must be gathered from the language used therein. In such case the office of the court is to ascertain the language used and then enforce it according to its legal effect; and when an agent's authority is limited and the party with whom he contracts has notice of such limitation or want of authority in the agent, under no circumstances can the principal be bound beyond the agent's authority.

POLICY OF INSURANCE—PRINCIPAL AND AGENT.—When a policy contained an express limitation on the power of agents, an agent has no legal right to contract as against the company with a party having actual knowledge of such want of authority so as to change the terms of the contract, or to dispense with the performance of any part of the consideration, either by parol or in writing; and a party by accepting a policy containing such limitation upon the powers of the agent, is estopped from setting up powers in the agent, at the time, in opposition to the conditions and limitations in the policy.

PRINCIPAL AND AGENT—EXTENT OF AGENT'S POWERS.—Agents of underwriters at a distance from their principals are either general or special agents possessing plenary or limited powers depending on the terms of the grant of power, or powers, exercised with the assent of the principals; and the extent of their power is to be determined by the same rules that control in respect to other agencies.

CONTRACT OF INSURANCE—SPECIAL AGENTS.—In case of a special agent the assured must, at his peril, know whether the act relied on is within the scope of the agent's real or apparent authority.

WRITTEN CONTRACTS—CONTEMPORANEOUS AGREEMENTS MERGED.—When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms; all antecedent and contemporaneous oral agreements are merged in the writing. In such case the writing is the sole evidence of the agreement, unless a mistake or imperfection in the writing is put in issue by the pleadings, or when the validity of the agreement is the fact in dispute.

EVIDENCE—CROSS-EXAMINATION.—When it appeared that a party had two furnished houses in the same vicinity, and there was a question which was his residence, it was not error in the trial court to exclude evidence on his cross-examination tending to show at which place he had the most furniture. Such fact was too remote to give any aid in determining the question.

PLEADINGS—INSTRUCTIONS ON A MATERIAL FACT NOT IN ISSUE SUGGESTED BUT NOT DECIDED.—In an action on a policy of insurance, when the plaintiff alleges that he duly performed all the conditions of said contract on his part, and upon the trial

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seeks to prove that the defendant waived the performance of certain conditions of the policy, and relies solely upon such waiver: *quære*, whether or not it is competent for the court to instruct the jury on a material issue outside of the pleadings, suggested but not decided, because the question was not made at the trial.

POLICY OF INSURANCE—CONDITIONS—PROOF OF LOSS.—When a policy of insurance required the assured to make certain specific proofs in case of loss, such requirements are conditions to be complied with by the assured before he has any legal claim against the company for loss, and in such case all the conditions must be substantially, if not strictly, complied with or no recovery can be had.

WAIVER—FACTS EXAMINED AND HELD INSUFFICIENT.—The facts examined and held that the condition of the policy as to proof of loss were not waived, and that there was not sufficient evidence to carry that question to the jury.

WAIVER—ESTOPPEL.—A waiver that would preclude the defendant from relying on the terms of the policy must be in the nature of an estoppel. The company must, by some act of an agent having real or apparent authority, have done or said something that induced the plaintiff to do or forbear to do something whereby he was prejudiced.

POLICY—CONDITIONS—FAILURE OF ASSURED TO MAKE PROOFS.—When a failure to comply with the conditions of a policy is due wholly to the fault of the insured, the general doctrine seems to be that the policy is dead and cannot be revived by anything short of a new consideration or an express waiver on the part of the insurer. If no proofs are served in time, and the insurer has done nothing to induce the omission, the insured has lost all rights under the policy, and the insurer is not bound to specify its defenses, nor does it waive those not specified.

POLICY—TERMS OF AS TO WAIVER.—Where a policy contained an enumeration of particulars that should not constitute a waiver of its terms or conditions in an action thereon, it may rely upon the terms of the policy unless precluded by fraud or by such facts as would constitute an estoppel.

NON-SUIT—OCCUPANCY OF THE DWELLING-HOUSE INSURED.—On motion for a non-suit, the facts examined and held that the dwelling-house insured was not occupied at the time of the loss within the meaning of the policy.

POLICY OF INSURANCE—PROPERTY UNOCCUPIED.—The application for a policy of insurance provided that, "in case any of said property shall be or become vacant or *unoccupied*, the said policy shall remain suspended and be of no effect in respect to any of these contingencies;" and further provided that if any change shall take place in the occupancy of said premises * * * "without being immediately notified and its consent thereto obtained in writing and endorsed hereon and signed by the president or secretary of this company, this policy shall, in either event, immediately thereafter be null and void"; and, further, that "this company shall not be liable for any loss or damage while the above-mentioned premises shall be vacant or *unoccupied*"; *held*, that while the premises insured were not occupied the policy was suspended, and if the loss occurred during said time there was no liability on the policy. For a dwelling-house to be occupied within the meaning of this policy it must be used by human beings as their customary place of abode.

APPEAL from Umatilla county: JAS. A. FEE, judge.

On the twenty-eighth day of March, 1888, the defendant insured the plaintiff's house and certain household goods therein against loss or damage by fire. On the ninth of July of the same year said house and goods were destroyed by fire, and this action is brought to recover the amount of such policy, which is \$350. The plaintiff had judgment

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for the full amount claimed, from which this appeal is taken.

The complaint is in the usual form in such cases. On the subject of the loss and proof thereof it has this averment: "That on the ninth day of July, A. D. 1888, said dwelling-house, with said beds, bedding and household furniture therein, were totally destroyed by fire; * * * that immediately thereafter plaintiff furnished the defendant with proof of his said loss and interest, and otherwise performed all the conditions of said policy on his part to be performed."

The answer denies each of the allegations of the complaint except the issuing of the policy and the loss. It also contains the following new matter: "That the basis of said policy of insurance is the written application of the plaintiff therefor, and that said policy was so made and issued upon and under said application and upon and under the statements, representations, agreements and warranties therein contained. Among other things said application contained the following provisions, to wit: "Application is made by John Weidert, of Vansycle Canyon, county of Umatilla, State of Oregon, for insurance against loss or damage by fire by the State Insurance Company in the sum of three hundred and fifty dollars, for the term of one year from the thirteenth of March, 1888, by a policy, the usual conditions of the company, based upon the terms, agreements and statements herein and hereon, on the property hereinafter described. The applicant agrees that all valuations are made by such applicant, and that the company is not to pay in case of loss to exceed three-fourths of the actual cash value of any building; that if this application does not truly answer the following interrogatories, and correctly describe, state and make known the property, the value, the title, the location, the exposures, the occupancy, the liens and incumbrances thereon and interest therein, or if any misrepresentations or omissions to make known any and all facts material to the risk are made herein or

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hereon, then the said policy shall, in either event, be null and void. The applicant further agrees that if the applicant or any one else shall have or shall hereafter make any other insurance on the property herein named or any part thereof, or if there be any change or alteration either in the tenants, title, incumbrances, occupancy, stove pipes passing through the roof or sides of the building or the erection of buildings or exposures, or if said property shall be conveyed or incumbered, in whole or in part, whether by judgment, mechanics' lien, judicial decree, mortgage, voluntary transfer or otherwise, or in case any of said property shall be or become *vacant* or *unoccupied*, that the said policy shall remain suspended and be of no effect in respect to any of these contingencies, unless notice shall be given to this company, and its consent obtained in writing, and the same be endorsed upon the policy by the secretary before loss or damage shall occur. The applicant further agrees that the foregoing answers and statements are true, and a warranty on the part of the assured; that any solicitor or agent of this company, in filling out or writing this application, in performing such act, is the agent of and acts for such applicant, and not of or for or on behalf of this company, under any circumstances or in any manner whatever, and that the company shall in no respect be bound by any act done or statement made to, promise or knowledge of, any solicitor, agent or other person which is not in such application, and that any notice given to, representation made, or knowledge of, any solicitor, agent or other person representing this company, of any fact, change, act or thing relating to the property, title, occupancy, incumbrance or otherwise, insured under said policy, subsequent to the issuing of the same, shall not in any wise be binding on or be regarded as notice to or knowledge of this company; but in order to be binding must be endorsed in writing on said policy by the company as provided therefor." * * *

The policy, after declaring that the basis of said contract is the said application, which shall be deemed and taken

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as a part of the policy, and as a warranty on the part of the assured, and that any false or untrue answers, representations or statements therein or thereon should render the said policy void, and that this contract of insurance was embraced wholly in said application and obligation of the assured, and this policy contains this further provision: "This company shall not be liable for any loss or damage while the above-mentioned premises shall be *vacant or unoccupied* or resulting from the neglect of the assured to use all possible effort to keep the property safely protected against fires that may originate or start on the prairies," etc. And this: "In case said property or any part thereof shall be sold, conveyed or encumbered, or if any change shall take place in the title, possession or *occupancy*, * * * without being immediately notified to this company, and its consent thereto obtained in writing and endorsed hereon and signed by the president or secretary of this company, this policy shall in either event, immediately thereafter, be null and void."

The policy also contains a repetition of the statement contained in the application to the effect that it is a part of this contract that any person other than the assured who may have procured this insurance to be taken by the company shall be deemed the agent of the assured and not of this company under any circumstances whatever, etc. It is then alleged that the plaintiff, in disregard and violation of the agreements, provisions and conditions of said application and said policy, permitted and caused said dwelling-house to become and remain unoccupied prior to and continuing up to the time of said fire without notifying the defendant thereof and without in any way obtaining the consent of the defendant thereto or therefor.

As a further and separate defense the defendant alleges the following facts: That among other conditions on the back of said policy, and made a part thereof by the terms of said policy and by the terms of said application therefor, it is provided: "All persons having a claim under this policy for loss or damage shall proceed at once

Statement of facts.

to put the property saved or damaged in the best order possible, separating the damaged from the undamaged, and shall give immediate notice, and shall render a particular account thereof in writing to the company, stating the time, origin and circumstances of the fire; the occupancy of the building insured or containing the property insured at the time of the loss; the whole value and ownership of the property insured, and all encumbrances thereon; the amount of loss upon each article; other insurance, if any, giving a copy of all policies,—all of which shall be verified by the affidavit of the assured or claimant.” It is then alleged by special averment in the answer that the plaintiff never complied with either or any of these requirements and conditions.

The reply, among other things, contains these denials and allegations: Plaintiff denies that, in disregard or violation of the agreements, provisions or conditions of said or any application of said or any policy, said plaintiff permitted or caused said dwelling-house to become or remain unoccupied for a long or any period prior to or continuing up to the time of said fire without notifying the defendant thereof, or without in any way obtaining the consent of the defendant thereto or therefor; and the plaintiff alleges that at the time he made the application to the defendant for said insurance policy it was expressly understood and agreed by and between the plaintiff and the defendant that said plaintiff should and would be permitted at any and all times during the continuance of said policy to remove from said house and remain from said house to pursue certain farm labor in which plaintiff was engaged and had to do and perform, and for the further purpose of going to and returning from the mountains to haul wood for the use of the plaintiff and his family; and it was mutually understood and agreed, and defendant at the time of said application consented, that while the plaintiff was absent as aforesaid plaintiff's wife and family might remove to some place not so lonesome as the said house of the plaintiff.

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The reply further denies that, in disregard of the provisions of said or any condition, the plaintiff failed or refused to give notice to the defendant in writing or proof of his said alleged loss in writing or at all, or to render a particular or any account thereof in writing or at all, or the origin or circumstances of the fire, or the whole value or any value or ownership of the property insured, or any part thereof, or all or any of the incumbrances thereon, or the amount or loss upon each article or articles; and denies that he failed or refused to verify by affidavit or otherwise or at all any proof of any loss or any account or notice thereof of any kind; and plaintiff alleges that immediately after said fire he made frequent applications to defendant and to its agent to adjust his loss caused by said fire, but said defendant at all times neglected and refused to entertain plaintiff's application or to adjust his said loss. The other facts appear in the opinion.

W. H. Wilson, for Appellant.

W. E. Crews, for Respondent.

STRAHAN, J., delivered the opinion of the court.

The following are the assignments of error made by the appellant and which have been argued in this court:

First—Error of the court in permitting the plaintiff to give evidence of an oral agreement between him and one Reeder, a solicitor of the defendant company, to the effect that the plaintiff might leave the insured premises unoccupied.

Second—Error of the court in refusing to allow counsel for the defendant to ask the plaintiff, while a witness on his own behalf, how much more furniture the plaintiff had at what was known as his middle ranch than at the place that was burned.

Third—Error of the court in charging the jury as follows: "The court charges you that if you find from the evidence that the plaintiff made a statement in writing to the company, although such statement was not verified,

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if the company acted upon it and sent an adjuster to settle or adjust the loss, then the company will be deemed to have waived that condition in the policy."

Fourth—Error of the court in overruling defendant's motion for a non-suit.

These assignments, so far as may be necessary to the proper disposition of the case, will be considered in their order.

1. The first assignment of error is based on what occurred at the trial in the examination of the plaintiff as a witness in his own behalf. He testified without objection that in March, 1888, one L. B. Reeder came to him and asked him to have his property insured, and said that he had been there twice before to see him on the same business. Counsel for the defendant here asked and obtained leave of the court to inquire of said witness whether he had made a written application for insurance, and he answered that he had; and said application being shown to the witness, he further testified that he had signed it at the time, but that he did not read it or hear it read except as Mr. Reeder read it to him; that he was a German and did not speak, read nor write the English language very well, but that he could read some and there were always some difficult words that he did not know the meaning of. The application was then offered in evidence and was received without objection, and the bill of exceptions recites that it contained the provisions set forth in the defendant's answer, in the same words as in said answer set forth. It also contained a particular description of the premises insured, and stated that the same was occupied by the insured as a private dwelling, and the following statements were endorsed thereon: "A part of Mr. Weidert's family lives in this house and the other part lives in his other house," and on the back thereof was signed the name, "L. B. Reeder, solicitor." The witness then testified, under an objection, and exception by the defendant, that, at the time he made his application for insurance, he asked Reeder particular questions—*c. g.*:

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"How is this," I said, "when I move away and have part of my family here and a part with me as I will have to do?" He said: "As long as your furniture remains here and the house is occupied, all right." I said: "I will be away plowing before long now and cannot stay on this place all the time." And he said: "It does not make any difference; you can move." I then said: "If this is the case, if I don't have to stay right steady I will get insured." Whether this evidence is competent is the question submitted for our determination.

One objection made to this character of evidence by the appellant is, that Reeder had no authority to make any contract or agreement whatever with the assured, and that his want of authority to make agreements concerning the occupancy of the premises insured outside of or different from the terms of the application and policy was plainly printed in the application, which the plaintiff signed, and that he was bound to take notice of his want of authority. It must also be observed in this connection that the plaintiff says that Mr. Reeder read over the application to him at the time he signed it, and it is not pretended that he read it incorrectly; and while the plaintiff testified that he is a German and does not understand English very well, he nowhere claims that he did not understand every word of that application. In the light of these facts how can it be claimed that Reeder could make any other or different contract with the assured than to take his written application according to the rules of the company and forward it to the home office; and if it was there approved, a policy to be based on said application, and not on something the solicitor may have said to the assured, would be then issued? When it expressly appears that this solicitor's powers were so limited and that the plaintiff knew it, how can it be claimed that the defendant was bound by his unauthorized act. Contracts of insurance must have effect like all other written contracts. The intention of the parties must govern and control, and when the language is plain and unambiguous, such intention must be gathered from such language. In

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such case the court simply ascertains the language the parties themselves have agreed to and written down in their contract and enforces it according to its legal effect. When an agent's authority is limited and the party with whom he contracts has notice of such limitation or want of authority in the agent, under no circumstances can the principal be bound beyond the agent's authority. This principle has been applied to contracts of insurance. In *Catoir v. The American Life Ins. and Trust Co.*, 33 N.J. 487, it was held that when a policy itself contained an express limitation upon the power of agents, an agent had no legal right to contract as against the company with the party to whom the policy had been issued so as to change the terms of the policy, or to dispense with the performance of any part of the consideration, either by parol or in writing; and such party is estopped by accepting the policy from setting up powers in the agent at the time in opposition to the conditions and limitations in the policy. So in *Armstrong v. State Ins Co.*, 61 Iowa, 212, it was held that an agent of a fire insurance company who had authority to take applications for insurance and receive and receipt for premiums and forward applications and premiums and receive from the company policies of insurance when issued and deliver them to the assured, and who had no other or further powers, real or apparent, could not bind the company by a contract of insurance. So in *Oritchett v. The American Ins. Co.*, 53 Iowa, 404, where a note was given in payment of a premium upon an insurance policy, which provided that if default was made in the payment of any instalment of premium upon any premium note for thirty days after due, the company should not be liable for any loss happening after that time and before payment. It was claimed that an agent who had authority to receive applications for insurance and collect and transmit premiums, had extended the time of payment, but it was held that such extension, even if shown, was not binding on the company and they were not liable for loss occurring during the period of such pretended extension.

Merceran v. Phoenix Mutual Life Ins. Co., 66 N. Y. 274, is a very important case involving the principle under consideration. In that case the limitation of the agent's powers was endorsed on the policy, and he possessed powers similar to those conferred by the defendant company in this case. The agent called upon the assured, who was ready to pay the premium, but the requisite receipts had not been forwarded from the home office to enable the agent to receive the premium, and therefore the agent said to the assured, "Give yourself no trouble about it; I will see that you are kept all right with the company." A loss occurred and the company set up the non-payment of the premium as a defense, and the plaintiff relied upon a waiver by the company through its agent; but the defense was sustained. Allen, J., delivering the opinion of the court, said: "Agents of underwriters at a distance from their principals are either general or special agents, possessing plenary or limited powers depending upon the terms of the grant of power or powers, exercised with the assent of the principals; and the extent of their authority is to be determined by the same rules that control in respect to other agencies." And it was further held that the assured had knowledge of the limited powers of such agent and he was estopped from claiming that said limitation did not exist or in hostility to it. And in *Wood on Fire Insurance*, § 411, the doctrine is stated as an elementary principle. It is said: "So, where direct notice, or any notice which the assured as a prudent man is bound to regard, is brought home to the assured, limiting the powers of the agent, he relies upon any act in excess of such limited authority at his peril. That an insurance company has a right, in a fair way, to limit the powers of its agents, must be conceded, and when it does impose such limitations upon his authority in a way that no prudent man ought to be mistaken in reference thereto, it is not bound by an act done by its agent in contravention of such notice." And *Sluggart v. Lycoming Fire Ins. Co.*, 55 Cal. 408; *Pottsville Mutual Fire Ins. Co. v. Fromm*, 100 Penn. St. 347; *Residence Fire Ins. Co.*

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v. *Hannawold*, 37 Mich. 103; *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516; *Dickinson Co. v. Mississippi Val. Ins. Co.*, 41 Iowa, 286; *Security Ins. Co. v. Fay*, 22 Mich. 466; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Penn. St. 402; *Alexander v. Germania Ins. Co.*, 66 N. Y. 464; 23 Am. R. 76; *Galbraith v. Arlington etc. Ins. Co.*, 12 Bush, 29, are to the same effect. The law of agency is to be applied here, and it is not different in its application to insurance from what it is in any other case to which it is applicable. 2 Wood on Fire Insurance, § 421, no doubt states the true rule. The author says: "But, in all cases, the distinction between the powers of general and special agents should be kept in view, and, in the case of a special agent, the assured *must at his peril know whether the act relied on is within the scope of his real or of his apparent authority*. He is bound to know when he has passed the precise limits of his power, and cannot rely upon the assumption of authority by the agent to do an act beyond the scope of actual authority, real or apparent. The declarations of an agent are not evidence of his authority, *but the scope and extent of his powers must be determined by his actual authority or by his acts, and the recognition thereof by his principal*." Counsel for respondent cites *Woodruff v. The Imperial Fire Insurance Co.*, 83 N. Y. 133; but in that case the agent did not assume to make a different contract from what was contained in the application and policy, nor does it appear what was the scope or extent of his authority or apparent authority. He also cites *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297, but that case relates to the question of waiver by the company, and does not touch the question under consideration. *Menk v. Home Mut. Ins. Co.*, 76 Cal. 50, 9 Am. St. R. 158, is also cited. In that case under an issue of misrepresentation it was held competent in an action on a fire insurance policy to give evidence that the application was made out by an agent of the insurance company with full knowledge of the condition of the premises, and that the plaintiff did not know what representation it contained. Whether the agent was general or special does not appear, and express averments were made

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as to the misrepresentation. *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 7 Am. St. R. 557, is also cited by respondent, but that case does not hold that the acts of a special agent with limited powers known to the assured would bind the company. It holds that, if, after hearing a full and truthful statement of the condition of the property insured from the owner, an agent of an insurance company fills the blanks in a printed form of application furnished him by the company with misrepresentations and false statements, and the insured signs the same without knowing its contents, and without other fault than that he relied upon the agent to write down his statements correctly and pays the premium, obtains a policy and sustains a loss, that the company was estopped from denying its liability under the policy. In this case the pleadings present no issue as to misrepresentation, nor under the facts disclosed would the questions involved be materially affected, if they did. *Kruger v. Western F. & M. Ins. Co.*, 72 Cal. 91, 1 Am. St. R. 42, is also relied upon, but the court in that case found expressly that the agent was a general agent of the company, and that he had the power to waive the conditions of the policy. *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. R. 121, is also cited by the respondent; but in that case the 121, is also cited by the respondent; but in that case the agency was general and not special, and the learned editor has appended a note in which it is stated that an insurance company has power to restrict the powers and duties of its agents as it may choose; and when their authority is expressly limited and restricted by the policy which the assured receives, such restrictions and limitations must be regarded as binding upon him. Citing *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527; 8 Am. St. R. 908, and note 913.

But in addition to what has been said it is not perceived, when fraud, or mistake, or other imperfection in the writing is not put in issue by the pleadings, on what ground this evidence could be admitted. The statements relied upon were contemporaneous with the writing. In such case they are merged in the writing and cannot be proven unless under particular circumstances, which do not appear

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here. This is the common law and was deemed so important by the legislature that it is enacted as a part of the statute law of this State. Hill's Code, § 692.

2. The next error complained of is the refusal of the court to allow plaintiff to testify on his cross-examination by defendant's counsel, as to how much more furniture he had at what was known as his middle ranch than at the place that was burned. This ruling was not error. The facts sought to be elicited are supposed to have some bearing upon the question of the occupancy of the building insured, but we think otherwise. They were too remote. We think the facts elicited show that the plaintiff had all the necessary furniture to answer his purposes at both places, and whether he had a little more or a little less at one place or the other had no bearing upon the question of occupancy.

3. The next error relied upon by the appellant is the giving of the following instruction to the jury by the court: "The court charges you, that if you find from the evidence that the plaintiff made a statement in writing to the company, although such statement was not verified, if the company acted upon it and sent an adjuster to settle or adjust the loss, then the company will be deemed to have waived that condition in the policy."

The pleadings present no issue whatever on the subject of waiver by the company of this or any condition in the policy. The plaintiff alleges that he duly performed all the conditions of said contract on his part to be performed. This he might do under section 87, Hill's Code, but the same section also provides that if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance. On the trial in this case the plaintiff made no attempt to establish the facts showing performance, but what he undertook to prove was that the defendant had waived the performance of a particular condition of the policy, and it was on that subject—an issue vital to the plaintiff's case, and not in the pleadings—that the court instructed the jury. On this

branch of the plaintiff's case the court by this instruction made it possible for the plaintiff to recover on a question of fact nowhere alleged in the pleadings. *Warren v. Bean*, 6 Wis. 120. But this question was not made in the argument, and we will not place our decision upon it. We only refer to it to indicate what we conceive to be the correct method of pleading in such cases, and to avoid misconception.

There is no doubt that the policy declared on by the plaintiff makes certain proofs to be furnished by the assured in case of loss, conditions to be complied with by him before he has any legal claim against the company for loss, and in such case all the conditions must be substantially, if not strictly, complied with, or no recovery can be had. 2 Wood on Fire Ins., § 436, and authorities there cited. It is equally as well settled that the failure to make such proof may be waived by the company. 2 Wood on Fire Ins., § 439, where the authorities are carefully collated.

One of the conditions of the plaintiff's policy in case of loss or damage, was that he was to perform certain things in respect to the damaged property and then give immediate notice and render a particular account thereof in writing to the company, stating the time, origin and circumstances of the fire, the occupancy of the building insured, or containing the property insured at the time of the loss; the whole value of the ownership of the property insured, and all encumbrances thereon; the amount of the loss upon each article; other insurance, if any, giving a copy of all policies—all of which shall be verified by the affidavit of the assured and claimant. And here is what the plaintiff says he did after the fire, as recited in the bill of exceptions: That at the time the fire occurred, which was the night between the ninth and tenth of July, he was at the mountains to get two loads of wood to make his home there; that after the house was burned, two or three days after, he went to Mr. Reeder to notify him. Mr. Reeder was not there, but his brother was. The second time he went to see Mr. Reeder he was there, and he showed wit-

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ness a letter he had received from the company and he read it to him. When he went to Reeder he said he would write a statement for witness; that witness wrote to the company himself and received a letter from them; that after this Reeder came out to the place, and also Mr. Beeler, but that he was in Walla Walla at that time. That he offered to make a statement to Mr. Reeder in reference to this matter. On his cross-examination the witness said that he did not know whether he wrote the letter to the company right away after the fire or not; that he could not state the date; that he did not know whether he wrote once or twice; that he wrote as soon as Mr. Reeder told him to do so; that he told Mr. Reeder that he could not write very good, but Reeder told him to do as good as he could, and so he wrote. After being recalled the plaintiff testified that he receive a letter from defendant, which he delivered to Mr. Tustin. Mr. Tustin was then called and testified that the plaintiff delivered a letter to him with the policy; but after making diligent search in his office, and at all places where he kept such papers, he was unable to find the same. The witness was then asked to state the contents of said letter, and without giving date he said that as near as he could remember it read:

*"Mr. John Weidert—*DEAR SIR: We have received your letter from Mr. Reeder as to your loss by fire, and we will send an agent as quickly as possible to value the damage." They said Mr. Reeder was agent. It does not appear that this paper was signed by any person. The witness further testified that Beeler was named in that letter; that he had gone to Mr. Reeder and told him to write, and afterwards Reeder told him he had written. Mr. Paul testified that Mr. Beeler came to the place with Mr. Reeder and that the plaintiff was away from home; that they staid about half an hour and said they wanted to see the plaintiff very bad; after dinner they went down toward the house that was burned. Beeler told the witness that he wanted to see Mr. Weidert; that he wanted to settle it up; that the plaintiff was expected home from Walla Walla that evening,

and they said they wished they could stay, but they had to be in Portland that evening and could not wait; he just said he wanted to settle up from that fire. This witness on his cross-examination said that Beeler told him that he wanted to see the plaintiff about the fire and settle up; that he did not say anything about the money, but only said that he wanted to see about the fire and how it was, and that he wanted to settle up; that he went down to the house that was burned, then he asked where the road was, and that was all he said. Mrs. Weidert testified substantially to the same facts as to Reeder's and Beeler's visit. The defendant having proven the plaintiff's signature to the following letter, offered the same in evidence:

NOVEMBER 2, 1888.

*"To the State Insurance Company—*DEAR SIR*s:* I just met with Mr. Reeder on the twenty-ninth of October. We have missed one another before. Even when Mr. Reeder was at my place I was to Walla Walla; that is twenty-six miles from my place. I did not know that he was coming that day or else I would have stayed at home. Mr. Reeder wanted me to state something to you about my business.

"About this place where this house has been burned: This house I bought for my special home on account of there being a good house and good water on it. I could have insured it for \$300 more than I insured it for, but I did not want to. Where I lived before I had to haul water. I could not move in that house when I bought it. It was rented till the first of March. This family moved out, and I moved in this house till I was done plowing. I have got ranches two and three miles apart. Then I moved on to the next place and camped there, to plow there. This time the man who had the house before came to me and said: 'Mr. Weidert, can I rent this house from you till the first of July?' I said 'No; I think I will get done here by the first of June, and then I want to move back again; but if you don't disturb the furniture you can move into it till

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the first of June, and then I want to move back.' Accordingly he says: 'All right; it accommodates me very much.'

'I had another place two miles further north, which I had hired to plow, but the last week in May this man sent me word that he could not plow the ground for me, so I had to finish this place and go there and plow that myself. I had to camp on the bunch-grass and cook on a camp fire.

'The first of June came and this man came to me and said: 'Mr. Weidert, I cannot move by the first of June, and I would like to get ten or twelve days longer.' I says, 'All right, Mr. McNett; I don't think I can get back as soon as I calculated, on account of this plowing.' So he moved on the twelfth of June. I did not get done plowing on that place till the twentieth of June. Then we went to Walla Walla and visited our friends and picked berries, and canned them at the same time, because they don't haul well that far. By that time the Fourth of July came on, and we stayed over the Fourth, and we came back the seventh of July, when we finished plowing.

'Then we went to the mountains to haul a couple of loads of wood back home. It got a little late when we came back from the mountains, so we left our wagons standing where we stopped to take them home the next day. And that day our turn came to have our hay cut, and I had to go and show where to cut it. I told the hired man to fetch our dinner and help cut some hay when he came. He drove by there with a hack to bring something. When he came up to us he said, 'We are moved now; the house is burned down,' and I and the man cutting hay for me dropped everything and walked there and we found it burned down. So we had to move down where we were cutting hay at that time, where there was an old shanty standing.

'I had to move my family in town this winter to stay till next spring. This shanty is too cold. I was waiting on this new railroad to bring some dry lumber up here. They don't bring dry lumber this fall, and will not till

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next spring, so I can't build till next summer. We have got to haul the lumber with wagons too far here.

"The eighth of July (that was Sunday) we were in the house to straighten things up in the house, so that we would not be bothered when we came from the mountains. We were there pretty near every Sunday to look after our things and make our home there.

"Gentlemen, that is as near as I can state it to you. I asked Mr. Reeder if it would make any difference if I was out to my other places at work, and he said, 'No, sir.' We have never left the house more than a week without going back and taking care of things there. Please write me an answer on this statement as soon as possible.

"Yours truly,

JOHN WEIDERT.

"VANSYCLE, Umatilla county, Oregon."

On the question of waiver the policy declared on contains this statement: "It is expressly agreed that if any person or persons on behalf of the company shall aid or attempt to aid the claimant in making proofs of loss, so-called, or examining the claimant, or otherwise investigating such claim, that in either of such events, no conversation, promise, agreement or understanding of such person with such claimant or any one else on his or their behalf, or notice given to, or knowledge obtained by such person or persons, shall be in any manner binding on the company, or regarded as a waiver or estoppel of any condition of this policy or the law applicable thereto; and that no person has any authority or power to make any promise or agreement to pay any loss or claim under this policy or to waive any conditions of this policy or the law applicable thereto except the president or secretary of this company, and then only when the same and all the detailed terms and conditions thereof are reduced to writing and duly signed by said president or secretary."

The instruction under consideration wholly ignores the element of time within which proof of loss should be made. By the terms of the policy it was to be *immediately* after the loss, which I have no doubt required diligence

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on the part of the assured. But the time could doubtless be waived as well as any other condition of the policy, and the question, therefore, is whether or not there was any evidence of waiver which authorized the court to submit that question to the jury. Just when the plaintiff wrote to the defendant does not appear, nor does the evidence anywhere disclose the nature or contents of the letter he says he wrote sometime after the fire. It might be inferred from the contents of the letter which he says he received from the company, that it said something about the plaintiff's loss, but that letter was not signed by any person and it does not appear whether it really came from the company or not. More than that, the letter which the defendant received from the plaintiff of November 2d, and which it conceded that he wrote, tends very strongly to show that the plaintiff did nothing after the fire by way of submitting proof of loss until he wrote this letter. The first paragraph of that letter admits of no other reasonable interpretation. But taking all the oral evidence together with the letter, does it tend in any manner to prove a waiver? A waiver in this sense is in the nature of an *estoppel*. The company must, by some act of an agent having real or apparent authority, have done or said something that induced the plaintiff to do or forbear to do something whereby he was prejudiced. It does not appear from this evidence that the company did anything of that kind in this case, nor does it appear that it acted upon any statement in writing made by the plaintiff, or that it sent an adjuster to settle or adjust the loss. What relation Mr. Beeler sustained to the company does not appear. He may have been an authorized adjuster of the company, but if he was the fact does not appear from this record, and until such fact be shown, it is not perceived on what ground the company could be bound by his acts. But conceding that the record shows that he was such adjuster, the fact that he went to the place of the fire sometime after it occurred and inquired for the plaintiff, and said and did all the other things

which the evidence tends to prove, there is not enough shown to constitute a waiver. Section 439, 2 Wood on Fire Ins., sums up the result of the cases by saying: * * * ‘But generally it will be found that the delay has been induced by such acts and conduct on the part of the insurer or his agents as amounts to an estoppel rather than a waiver, and the general doctrine seems to be, and that more consistent with principle, that when the failure to comply with the condition is due wholly to the fault of the insured, the policy is dead and cannot be revived by anything short of a new consideration and an express waiver on the part of the insurer. And in the same section the learned author cites *Brink v. Hanover Fire Ins. Co.*, decided by the court of appeals of the State of New York, in which case the court said: ‘If no proofs are served in time, and the insurer has done nothing to induce the omission, the insured has lost all rights under the policy, and the insurer is not bound to specify its defenses, nor does it waive those not specified.’”

4. But however this may be, there is another view of this subject that is decisive against the plaintiff on this question. An insurance contract, like every other contract, in the absence of fraud, illegality or mistake, must be so construed that every part of it shall have effect according to its terms. The intention of the parties must be gathered from the contract; if that be uncertain, the circumstances, surroundings, situation of the subject matter and other rules of construction, may be resorted to for the purpose of aiding the court in determining the meaning of the contract and the intention of the parties in making it. But when the import of the language of the contract is so plain as to leave no doubt whatever as to what the parties intended, the court has no discretion but to enforce it. Section 694, Hill's Code, states the rule, which is only declaratory of one of the first principles in the laws applicable to the construction of contracts: “In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is, in

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terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all." A party cannot protect himself from the consequences of his own fraud by contract, but in the absence of something of that kind, I fail to see any reason why the terms of the policy as to waiver should not be given full effect. This the trial court did not give or allow by the instruction under consideration, and the same was therefore erroneous.

5. At the conclusion of the plaintiff's evidence, the defendant moved for a non-suit because the plaintiff had failed to prove a case sufficient to be submitted to a jury, which was overruled, and this is assigned for error. All the evidence is in the transcript, but the great length of this opinion will only allow a very brief examination of this question. The plaintiff encountered the same difficulty here that he did in another part of his case. He alleged due performance of the agreement on his part, and then sought to prove a contemporaneous parol agreement as to the occupancy of the premises, which we have already indicated was objectionable; but on the argument here, the plaintiff's counsel insists that his evidence tended to prove an occupancy of said premises from the date of the policy to the fire. To test the correctness of this claim, I have carefully read all the evidence and think it fails to show such occupancy. The plaintiff testifies that he moved away from the place on about the twentieth of March or the first of April, he did not remember which, and that McNett moved in the next day or day after that, he did not remember which; that McNett lived there until the fifteenth or twentieth of June, and that after McNett moved away from the house, he, or his hired man, or some member of the family, was there at the house every day to see if things were all right. He further says he was at the house after the twentieth of June frequently until the house burned; that the big members of his family were there often; that

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he was not there when it burned, and did not know how the fire occurred. On re-cross-examination the witness said he did not know whether Mr. McNett was at the house after the twelfth of June or not. He further said that some of the family were at the house every day; that they just went down there to see that nothing was destroyed. The fire occurred on the night after the ninth of July. Paul was also a witness, but his evidence adds nothing to what the plaintiff said. Conceding to the fullest extent all the facts that this evidence tends to prove, is any occupancy of said premises shown after McNett moved out? The appellant did not make the question as to whether McNett's moving into the house was a change in the tenancy within the meaning of the policy or not, and so we confine our inquiry simply to the question of occupancy after McNett moved out. In *Keith v. Quincy Mut. Fire Ins. Co.*, 10 Allen, 228, an instruction to the effect that it is not sufficient to constitute occupancy that the tools remained in the shop, and that the plaintiff's son went through the shop almost every day to look around to see if things were right, but some practical use must have been made of the building, and that if it thus remained without any practical use for the space of thirty days, it was, within the meaning of the policy, an unoccupied building for that time, and the policy became void, was approved by the supreme court of that State. So in *Ashworth v. Builders' Mut. Fire Ins. Co.*, 112 Mass. 422, it was held that a dwelling-house and barn are unoccupied within the meaning of an insurance policy which provides that buildings unoccupied shall not be covered by the policy when the house is only used by the insured and his servants for the purpose of taking their meals there when engaged in carrying on a contiguous farm, and the barn is only used for the purpose of storing hay and farming tools. So also in *Corrigan v. Connecticut Fire Ins. Co.*, 122 Mass. 298, it was held, in an action on a policy which provided that if the house should "remain vacant or unoccupied for the space of ten days without written notice to and consent of the company," it was not

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erroneous to instruct the jury that, if the house had not been used as a dwelling-place by some one within ten days of the loss, the policy would be void; and that if the former occupant had moved with his family into another house where they slept and took their meals, the fact that some of the furniture remained in the house, and the key had not been surrendered to the landlord, until within the ten days, does not constitute an occupancy of the premises. And in *Herman v. The Merchants' Ins. Co.*, 81 N. Y. 184, it was held that a dwelling-house was unoccupied when no one lives therein, but that it was not necessarily vacant. And in *Herman v. The Adriatic Fire Ins. Co.*, 85 N. Y. 162, it was held that for a dwelling-house to be occupied within the meaning of a policy, which contained a condition declaring it void in case the premises "became vacant or unoccupied, and so remained for more than thirty days without notice and consent of this company in writing," it must be used by human beings as their customary place of abode. *Cook v. Continental Ins. Co.*, 70 Mo. 610, was also an action on a policy which was to become void if the premises should be unoccupied. The insured left the house and went elsewhere to reside, taking only part of her furniture. She left a man in possession with instructions to sleep in the house at night. This man quit the premises and several days afterward a fire occurred, no one being in the house at the time; held, that the house was unoccupied and that the policy was void. Other authorities hold the same doctrine. *Etna Ins. Co. v. Meyers*, 63 Ind. 238; *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457; *Fitzgerald v. Conn. Fire Ins. Co.*, 64 Wis., 463.

Under the facts disclosed at the trial and in the light of the authorities cited, I think the conclusion irresistible that the building in question was not occupied at the time of the fire. In such case, the policy, by its terms, stood suspended. For the reason that proof of loss was not made as required by the policy and because the facts show that the building was not occupied at the time of the fire, the circuit court erred in refusing the defendant's motion

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for a non-suit. The judgment will therefore be reversed and the cause remanded with directions to allow the defendant's motion for a non-suit.

THAYER, C. J., being directly interested in the result, did not sit and took no part in the decision of this case.

LORD, J. I concur in the result only

[Filed May 19, 1890.]

WILLIAM MEACHAM, APPELLANT, v. WILLIAM STEWART, RESPONDENT.

PATENTS—WHEN NOT REQUIRED TO BE RECORDED.—Patents from the Government or State do not come within the provisions of the recording laws of the State where, by the terms of the statute, they are not expressly included.

PATENTS—WHEN TO BE RECORDED.—Section 3038 applies in terms to State deeds or patents, and expressly provides that the effect of recording them shall be the same as other deeds.

EFFECT OF RECORD—PRIORITY.—To give them like effect as other deeds, priority of record confers superiority of title to a subsequent *bona fide* purchaser of the same lands from the State.

APPEAL from Union county: JAS A. FEE, judge.

This was an action in ejectment to recover certain lands described herein. The verdict and judgment were for the defendant, from which this appeal has been brought. The plaintiff deraigns his title through a deed of conveyance made by the governor, the secretary of state and the treasurer, as a board of school land commissioners, for the land in dispute, to H. J. Meacham, dated on the fifteenth day of November, 1871, and recorded on the sixth day of June, 1883. The deed is in the form prescribed by the statute, and the grantee therein is the ancestor of the plaintiff. The defendant deraigns his title through a deed of conveyance made by the same public officials, as a board of school land commissioners, for the same land to one T. J. Hiltz, dated on the tenth day of August, 1874, and recorded on the seventeenth day of September, 1878, etc.

Robert Aiken, for Appellant.

W. M. Ramsey, for Respondent

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LORD, J., delivered the opinion of the court.

It will be noticed that, while the deed through which the plaintiff claims was executed prior to the deed through which the defendant claims, the deed of the latter was recorded prior to the former. Upon this state of facts the trial court held that the defendant had the better title, and instructed the jury accordingly with the result as stated. The question to be decided is, whether the statutes for recording conveyances apply to State deeds such as were made to Meacham and Hiltz. These deeds were executed under section 10, pp. 631 and 632, Deady's compilation of 1872, which, among other things, provided: "Which deed, without acknowledgment, shall be admitted to record and convey to the grantee all the estate which the State had in the land at the date thereof; and the commissioners shall preserve, in a bound volume, duplicates of all such deeds, with an alphabetical index of names of grantees, and such duplicate shall be primary evidence of such conveyance." Section 3038, Hill's Code, is as follows: "Patents from the United States or of this State for lands within the State, * * * and conveyances executed by an officer of this State by authority of law, * * * shall be entitled to be recorded in the records of deeds in the county in which the lands lie, in like manner and with like effect as conveyances of land duly acknowledged, proved or certified." Section 3027, Hill's Code, provides; "Every conveyance of real property within this State hereafter made, which shall not be recorded, as provided in this title, within five days thereafter, shall be void against any subsequent purchaser in good faith for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

The contention of the counsel for the defendant is, that by force of the provisions cited, the failure of a purchaser of lands from the State to record his deed within the time prescribed, and before the subsequent purchaser in good faith and for a valuable consideration of the same lands

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from the State has recorded his deed, is visited with the same consequences as in other cases of private parties; in a word, that priority of record confers superiority of title. It is conceded that each party stands before the court as a *bona fide* purchaser for a valuable consideration, and that the record presents no issue of fact to be decided by a jury; the sole question being whether the recording acts apply to State deeds or patents. The counsel for the plaintiff insists that such laws do not apply and that the doctrine of notice, which they are designed to impart, has no application in such cases.

It is, no doubt, true that patents from the Government or State do not come within the provisions of the recording laws of the State where the terms of the statute do not specifically include them. *Moran v. Palmer*, 13 Mich. 367; *Curtis v. Huntington*, 6 Iowa, 536; though it is usual to record them in the county where the land is situated; and such registration as a rule is expressly permitted by statute. In *Moran v. Palmer*, *supra*, the act authorizing the record of such patents only authorized it to be used as evidence, and did not undertake to make patents not recorded void in favor of subsequent *bona fide* purchasers from the United States; but the provisions of our statute are different. The section already referred to, authorizing the making of State deeds and the form thereof, declares that such deeds without acknowledgment "shall be admitted to record," and further that the duplicates of all such deeds "shall be primary evidence of such conveyance"; and if the object of this is not to give notice, but only to make the record evidence as the deed itself, there still remains the further section (section 3038) declaring that such deeds "shall be entitled to be recorded in the record of deeds of the county in which the lands lie, *in like manner and with like effect* as conveyances of land duly acknowledged, proved, or certified." This section applies in terms to State deeds or patents, and expressly provides that the effect of recording them shall be the same as other deeds. If like effect is to be given to the recording or failure to record

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such deeds as in cases of other deeds, they are within the provisions of section 3027, *supra*, declaring that a deed not recorded in five days from its execution is void as to subsequent purchasers in good faith and for a valuable consideration of the same real property whose conveyance shall be first recorded. Hence the deed to the plaintiff has become invalid, as against the defendant, by the operation of the recording acts.

There was no error and the judgment must be affirmed.

[Filed May 19, 1890.]

JOHN A. BROWN, RESPONDENT, v. THOMAS JESSUP,
APPELLANT.

APPEAL FROM JUSTICE'S COURT—FILING NOTICE OF APPEAL AND UNDERTAKING.—The statute regulating appeals from justice's court (§§ 2118, 2119, 2120 and 2121) does not in terms require that the notice of appeal must be first filed with the proof of service endorsed thereon; *held, therefore*, that an appeal was sufficient when the undertaking was filed with the justice before the notice, but both were filed with the justice within thirty days after the entry of judgment.

UNDERTAKING ON APPEAL—AFFIDAVIT OF SURETY.—An affidavit of the qualification of a surety on an undertaking for an appeal, which leaves the name of the surety blank at the beginning of the affidavit, thus: "—— being first duly sworn," etc., but contains no other defect, is sufficient.

APPEAL from Gilliam county: J. H. BIRD, judge.

This action was commenced in a justice's court in the city of Arlington before the recorder of that city, who is *ex officio* a justice of the peace within said city, where the plaintiff recovered a judgment for \$17. The judgment was entered on January 3, 1889. The justice's docket shows that a notice of appeal was filed on the tenth of January, 1889, and on the eleventh of the same month a bond for appeal was filed, with John Jordan as surety, which was approved by the justice. There is but one notice of appeal from the justice's court in the transcript, and the proof of service endorsed thereon is dated January 15, 1889, and it is marked filed the same day. There is no file mark on the undertaking. At the term of the circuit court succeeding the appeal, the respondent filed a motion to dismiss

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the same for the reason that there has been no undertaking filed in said cause as required by law, and that said appeal has not been perfected within the statutory time. This motion was allowed, and final judgment was entered against the defendant, from which this appeal is taken. The other facts appear in the opinion.

F. P. Mays, for Appellant.

A. S. Bennett, for Respondent.

STRAHAN, J., delivered the opinion of the court.

The only question presented on this appeal is the alleged insufficiency of the appeal from the justice. It was contended by the respondent that the notice of appeal was filed after the undertaking, and that there was therefore no undertaking given. The law regulating appeals from courts of record does prescribe the order in which the notice and undertaking shall be filed; that is, the undertaking must be filed *after* the filing of the notice, and it has been often held that a disregard of its provisions vitiated the appeal. Hill's Code, § 537. But the act regulating justice's courts, and appeals therefrom, do not contain those provisions. Section 2118 allows an appeal from a justice's judgment to the circuit court within thirty days from the date of the entry thereof; and section 2119 is as follows: "An appeal is taken by serving notice thereof on the adverse party, and filing the original, with the proof of service endorsed thereon, with the justice, and by giving the undertaking for the costs of the appeal as hereinafter provided." Although named in the section after the notice of appeal, it does not expressly direct that the undertaking must be filed after the notice of appeal. No doubt the better practice would be to first serve the notice of appeal, and endorse the proof of service thereon, and then file the same with the justice, together with the necessary undertaking. But the question which we must determine is, does a disregard of this order of procedure destroy the appeal or render it ineffectual? We think it does not.

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Such a construction of the statute would introduce a degree of strictness and technicality into the practice in justice's courts very much beyond the requirements of the statute, and at variance with its spirit and purposes. Both the undertaking and the notice were filed within the thirty days after the entry of judgment, and the notice had endorsed thereon at the time it was filed, proof of service, and this appears to be all that is requisite.

2. The name of the surety is not inserted in the body of the undertaking, and in the affidavit endorsed thereon his name is left blank at the beginning, thus: "—— being duly sworn," etc., but his name is signed both to the undertaking and the affidavit, and we think this is sufficient. *Dore v. Covey*, 13 Cal. 502, and *ex parte Fulton*, 7 Cowen, 484, hold that it is not necessary to insert the name of the surety in the body of the undertaking, and that his signature thereto sufficiently indicates his intent to be bound by the terms of the undertaking, which is all the law requires.

3. The objection to the affidavit does not fall within *Stark v. Stafford*, 14 Or. 317. In that case there were two blanks in the affidavit, one at the beginning as here, and the other blank not being filled, the qualification of the surety did not appear. It read, "worth the sum of ——." The court held this to be not in compliance with law and insufficient without pointing out the particulars. Section 2123 requires that sureties in an undertaking on appeal must have the qualifications of bail upon arrest. Section 118 prescribes what the qualifications of bail upon arrest shall be. In *Stark v. Stafford*, *supra*, no amount was specified and it did not appear that the surety was worth the amount specified over and above all debts and liabilities and exclusive of property exempt from execution. The cases are clearly distinguishable.

The court below therefore erred in dismissing the appeal, and its judgment must be reversed and the cause remanded for such further proceedings as law and justice may require.

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[Filed May 19, 1890.]

E. J. KEENEY, RESPONDENT, v. THE OREGON RAILWAY & NAVIGATION COMPANY, APPELLANT.

STOCK RUNNING AT LARGE.—Stock running at large are animals that roam and feed at will, and are such as are not under the immediate direction and control of any one; and in such case if they wander upon the track of a railroad, and are killed, the owner in allowing them to run at large is not guilty of contributory negligence and precluded from a recovery.

STOCK IN CHARGE OF A HERDER—CONTRIBUTORY NEGLIGENCE.—Stock in charge of a herder and subject to his control is not stock running at large, as the places whither they wander and feed, or lie down to rest, are selected by him and subject to his direction and control; and if he voluntarily drives and leaves them uncared for in a place of danger along a railroad track where injury is likely to happen to them as a probable consequence, and they are killed, his act will be regarded as the proximate cause of the injury and preclude the owner from recovery.

APPEAL from Gilliam county: J. H. BIRD, judge.

This is an action to recover damages for the killing of certain sheep by the defendant railroad, and is based on the statute. The answer, after denying the facts alleged, sets up a further and separate defense to the effect that the killing of said sheep was caused by the negligence of one George Taylor, and without any fault or negligence in the operation of the train, etc. Issue being joined, a trial was had and a verdict and judgment were rendered for the plaintiff, from which this appeal is taken.

W. W. Cotton, for Appellant.

Bennett & Wilson, for Respondent.

LORD, J., delivered the opinion of the court.

There is but one question that we deem it necessary to consider upon this record, namely, whether the evidence was sufficient to sustain the verdict. It arises out of the defendant's motion for a non-suit. The testimony of the plaintiff, as disclosed by the record, shows that one George Taylor was tending and in charge of the sheep when killed; that the night before the killing of them occurred he drove them across the railroad track and down to the river to water them; that he sometimes watered them there, but not often, and had brought them there that

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evening; that the railroad at that place, where the sheep were run over, is between four and five hundred yards from the river; that he left this band of sheep, composed of twenty-six hundred, on this space between the railroad and the river to rest that night, and repaired to his cabin for that purpose himself; that in the morning he drove the sheep to water and then went back to his cabin and begun cutting some wood, when he saw his sheep crossing the railroad track, and that about one-half of them was across, but they were strung out on the track; that he could see down the track for two miles, and looked to see if there was a train, but saw none, and went to get his horse, and then heard the train coming, but that it was not very close, but he went to get the sheep off the track; that the train whistled when about one hundred and fifty yards from the sheep and kept whistling and rung the bell, and that the sheep in their fright bunched when they were struck, etc.

Taking this evidence as true, is it sufficient to sustain the verdict, or did the court err in not granting the motion for non-suit. The contention of counsel for the defendant is, that from this evidence it clearly appears that it was the negligence of Taylor which occasioned the collision and caused the destruction of the sheep. It has been held in this State that the common law rule that every man is bound to keep his stock within his own enclosure does not prevail, and that a party in allowing his stock to run at large, which strays upon a railroad track and is killed, is not guilty of contributory negligence. *Moses v. S. P. R. R. Co.*, 18 Or. 385. And it is also provided under the statute under which this action is brought that the allowing of stock to run at large upon common unfenced range, or upon enclosed land owned or in the possession of the owner of such stock, shall not be deemed or held to be contributory negligence. Hill's Code, § 4048. Stock running at large are animals that roam and feed at will, and are not under the immediate direction and control of any one. They may be in an enclosure which may restrain the limits

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in which they shall wander and feed; or they may be on an unfenced range, relatively without limit, where they may roam and feed at will; but in either case they are not subject to the direction and control of any one. So to speak, they are master of their own movements, going whither they will without personal direction or control. In such cases, if they wander upon the track of a railroad and are killed, the owner in allowing them to run at large is not guilty of contributory negligence, and precluded from a recovery. But stock or sheep in charge of a herder and subject to his control, whether in an enclosed field or upon a range, is not stock running at large, as the places whither they wander and feed, or lie down to rest, are selected by him and subject to his direction and control. So that, if he voluntarily drives or leaves them in a place of danger, and where injury is likely to happen to them, along a railroad track, and they are killed, his act will be regarded as the proximate cause of the injury, and preclude the owner from recovery. In such case, the stock is not to be deemed running at large within the meaning of the statute so as to exclude the defense of contributory negligence.

Now, it appears that on the night previous to the killing of the sheep that the herder had driven them down to water on the river and left them all night on a narrow space or strip of land between the river and the line of the railroad; that it was only "sometimes" that he watered them at this place, but that he did it on this occasion, and when that was done he repaired to his cabin some distance away and remained for the night, leaving twenty-six hundred sheep hemmed in this narrow space along the track of the railroad, liable to be used at all hours of the night and day as the requirements of its business might demand, and with their feeding grounds on the other side of it. The sheep were thus voluntarily placed and left in a place of danger, and where, under the circumstances, injury to them would likely occur as a natural and probable consequence. As luck would have it, nothing occurred during

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the night to cause the sheep to leave the place in which they had been left, either arising from some external circumstances, or from the promptings of animal instinct. In the morning, after watering them, he again left them in this space between the river and the track of the railroad and went back to his cabin. The feeding grounds of the sheep were on the other side of the track, which they must cross to reach, and the direction their instinct would now lead them occurred, as was a plain consequence easily to be foreseen. When next he saw the sheep they were crossing the track, about one-half of them across it, and the other half strung out along the track. As no train was in sight and he could see two miles down the track, he went to get his horse, and then heard the train coming, and then went back to get the sheep off the track, and in the meantime the engineer began to sound the alarm, whistle, and ring the bell, and the sheep becoming frightened or panic-stricken, bunched, and the collision occurred, which caused the loss or destruction of the sheep alleged. The place where the sheep were turned loose and left uncared for, by the herder, under the circumstances, was a place where danger is known to exist and injury to them was a probable consequence.

In *Moses v. Southern Pacific Railroad Co.*, *supra*, it was said: "An owner cannot turn loose his stock regardless of circumstances, or at a place where danger to them is constant and imminent; and when an injury occurs to them as a consequence of his conduct, though the defendant may not have been free from fault, escape the charge of negligence, or a want of ordinary care. * * * In such case the act itself is equivalent to deliberately putting the stock into a place of danger, and where injury to them is a probable consequence. The stock do not stray into a place of danger but they are turned loose in a place where danger is known to exist, or may be foreseen by the exercise of

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ordinary care, and the party cannot and ought not to recover for injuries which are the direct result of his own negligence." The sheep did not stray from the range to the place where they were, but they were deliberately put where they were by the voluntary act of the herder; and there turned loose or left to roam at will at a place where danger is known to exist and injury likely to happen to them as a probable consequence of such an act. Nor is this all. The liability to loss of life and property, arising from such an act, to others, is incomparable to the damage to such animals, and is an important consideration not to be overlooked. The accident as it did actually occur illustrates the danger. It might have been a passenger train and thrown its cars from the track and endangered or destroyed the lives of its passengers. As the court said in *Smith v. Railroad Co.*, 34 Iowa, 508, "the owner of cattle may not turn them out and enable them to frequent a place of great peril on a railroad track, or its depot grounds, and then demand that the company shall stop its trains and drive off his cattle, or slacken the speed, or change the time table in order to deliver his cattle from the peril into which he has voluntarily placed them." We think, therefore, the act of the herder in putting the sheep on the narrow strip where he left them uncared for, and injury was likely to happen to them, under the circumstances, as a probable consequence, indicated such a want of ordinary care on his part as contributed to produce the injury of which the plaintiff complains, and precludes his recovery.

It follows that the judgment must be reversed with the direction to the trial court to sustain the motion for non suit.

[Filed May 21, 1890.]

STATE OF OREGON, RESPONDENT, v. J. D. COMBS,
APPELLANT.

• ENJOINTMENT—SALE OF SPIRITUOUS LIQUORS ON SUNDAY—SENTENCE.—On an indictment which charged an offense under section 1392, Hill's Code, a defendant cannot, on a plea of guilty, be sentenced under section 2, session laws, 1889, p. 2.

Statement of facts.

APPEAL from Grant county: M. D. CLIFFORD, judge.

W. M. Ramsey, for Appellant.

J. L. Rand, district attorney, and *J. J. Balleray*, for Respondent.

PER CURIAM.—It is conceded that the indictment charges an offense under section 1909, Hill's Code; and the defendant having pleaded guilty, is liable to punishment in any sum not exceeding twenty-five dollars, and not less than ten dollars. The record, however, discloses that the court, by some inadvertence, sentenced the defendant to pay a fine of one hundred and fifty dollars, under section 3, session laws, 1889, p. 9, and not under the section above cited.

As this was error, the judgment must be reversed, and the cause remanded to the court below with directions to sentence the defendant under section 1909, *supra*.

[Filed May 23, 1890.]

FANNIE C. BEEBE, RESPONDENT, v. SIMON L. MCKENZIE, APPELLANT.

WILL OR DEED—INTENTION TO CONTROL.—In construing an instrument to determine whether it is a will or deed, the intention is to control as collected from the whole instrument.

WHEN A DEED AND NOT A WILL.—Where an instrument conveys a present title to the grantee, and the grantor reserves out of the estate conveyed the right to the use and possession during his life, the instrument is a deed and not a will.

SUCH A DEED NOT AN ESTATE TO COMMENCE IN FUTURO.—Such an instrument does not create an estate in freehold to commence *in futuro*, and is not within the technical rule of the common law applied in such cases.

APPEAL from Union county: J. A. FEE, judge.

This is an action of ejectment, brought by the plaintiff against the defendant to recover the land described in the complaint. Both parties deraign title to the land from one Thos. McKenzie, deceased,—the plaintiff by deed, and the defendant as an heir at law. The cause was tried without the intervention of a jury, and judgment went for the plaintiff, from which this appeal is brought. At the trial, the plaintiff in support of her claim, offered in

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evidence the following instrument in writing: "This indenture witnesseth: That Thomas McKenzie, for the consideration of the sum of one dollar to him paid, has bargained, sold and quit-claimed, and by these presents does bargain, sell and quit-claim unto Fannie C. McKenzie the undivided one-half of the following described property, to wit: * * * The foregoing sale and conveyance is understood and agreed to be completed and done at the death of the said Thomas McKenzie, and that the possession and right of possession to and in the foregoing premises remains and rests, until his death, in the said Thomas McKenzie in consideration of the marital will and assistance extended by the said Fannie C. McKenzie; retains to himself only the life proprietorship and ownership of the foregoing property, and conveys to her all other rights which the said Thomas McKenzie may have therein. Said Thomas McKenzie shall not sell nor attempt — the said premises, but shall occupy the same during his life-time. To have and to hold the said premises with their appurtenances unto the said Fannie C. McKenzie, heirs and assigns forever. In witness whereof, etc.

"THOMAS MCKENZIE. [SEAL.]

"Done in presence of

"JOHN McDONALD.

"A. MEACHAM."

Then follows the acknowledgment, etc. To the introduction of which the defendant objected, which the trial court overruling, the said instrument was admitted as evidence, and the ruling of the court in admitting the same is the error assigned on this appeal.

T. H. Crawford, for Respondent.

Shelton & Carroll, for Appellant.

LORD, J., delivered the opinion of the court.

The only question presented by this record is as to the validity of the above instrument as a deed, the defendant contending that although in form a deed, it is a will, but if

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not a will, that it is a deed that attempts to create an estate to commence *in futuro*, and is therefore void. To determine the nature of an instrument, the intention of the maker to be collected from the whole instrument, subject to the rules of law, is the pole star by which to be guided. The fact that it is in form and phraseology a deed signifies nothing; if it is plain from the language used and what is appointed to be done after the maker's death that it is testamentary in its nature, it is a will. But if it is plain that it was the intention of the grantor to convey a present estate, though the possession may be postponed until after his death, it is a deed and not a will. The estate would stand created, but the possession or enjoyment of it postponed. The evidence of this intention as afforded by the instrument is, that it is in the form of a deed of conveyance. It was made in consideration of "marital will and assistance extended," and was executed with the usual formalities prescribed by law. The grantor acknowledged before the proper officer that "he executed the same freely for the uses and purposes therein named," and used words, namely, "has bargained, sold and quit-claimed, and by these presents does bargain, sell and quit-claim," that are specially appropriate in a deed, and not in a will. In the instrument itself it is referred to as a "conveyance," and the grantor delivers it as such to the grantee, who has it recorded as a deed. While this is not denied, it is urged from other language used in the instrument that the grantor never intended to convey to the grantee any present interest or estate in the land, but only an estate limited to take effect after his death, or to commence *in futuro*. The clause is not clear and its language is much involved, but it seems to us the intention is to convey the fee *in praesenti* to the grantee, the grantor reserving out of it the possession or enjoyment during his life. According to its terms it is "the possession and right of possession" that "remains and rests" in the grantor, of which he "only retains to himself the life proprietorship" in consideration of "marital will and assistance extended" by his

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wife. The intention is to convey presently the freehold or fee to the grantee, subject to the grantor's possession and use during his life. It is to take effect or took effect in interest upon the execution of the instrument, though the right of possession was postponed until after the death of the grantor. If this construction be correct, the intention of the grantor was to convey the land at the time the deed was executed and delivered, and to reserve to himself out of the estate conveyed the use and possession during his life. Looking at the whole instrument, it evinces a favorable intention to the grantee, nor does it contain any revokable words, or other language which indicates that it is testamentary in its nature. The language is "does bargain, sell and quit-claim," and the grantee is "to have and to hold the said premises," etc., "heirs and assigns forever." From all this it is clear that the instrument is not a will, but a deed, and conveyed a present title to the grantee, out of which the grantor reserved to himself the use and enjoyment of an interest during his life. As such, it was not a deed to commence *in futuro*, or to take effect at the death of the grantor, and, therefore, renders it unnecessary for us to consider whether, under our statutes and the policy of our laws, the technical rule of the common law in respect to creating estates to commence *in futuro* prevails.

There is no error and the judgment must be affirmed.

[Filed May 23, 1890.]

J. K. KELLY, APPELLANT, v. DALLES CITY,
RESPONDENT.

DONATION CLAIM—MILITARY POST—WHEN CLAIM NO PART OF.—The right to take a donation land claim under the act of congress of September 27, 1850, creating the office of surveyor-general of the public lands in Oregon, and to provide for the survey thereof, and to make donation to settlers, did not attach to any tract or parcel of land selected for a military post or within one mile thereof unless the residence and cultivation of the claim was commenced previous to the selection. The settlement of the donation claimant upon the land will not, however, be adjudged to have been in violation of the said act, where it appears that he duly filed a notification of his claim with the surveyor-general, made proof of residence

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and cultivation in accordance with the provisions of the said act, and that the same were duly received and acted upon by the land department, unless it is shown by competent proof that the selection was duly made prior to the settlement, although the land adjoining the claim was occupied at the time by United States troops as a military post.

DONATION CLAIM.—PRESIDENT NOR SECRETARY OF WAR CANNOT SELECT AS A MILITARY RESERVATION.—Where a qualified claimant under said act of congress duly made a settlement upon the public domain, and filed a notification with the surveyor-general claiming a parcel of land described therein as a donation claim under the act; *held*, that neither the secretary of war nor the president had authority to select the land as a military reservation without his relinquishment thereof or making him due compensation thereof.

APPEAL from Wasco county: J. H. BIRD, judge.

The appellant commenced a suit in said court to have the respondent decreed to be the holder of the legal title to certain land in trust for appellant, and to execute a deed of conveyance of all its rights, title and interest therein to appellant, with such other and further relief as he might be entitled to in equity.

He alleged in his complaint that on the twenty-second day of November, 1853, one Winson D. Bigelow, being then a resident and settler upon a certain tract of land in Oregon, and duly qualified to enter the same as a donation claim under the act of congress approved September 27, 1850, commonly known as the "Donation Law," filed with the surveyor-general of Oregon a notice in writing, setting forth his claim to the benefits of the fourth section of said act of congress, and wherein he notified said surveyor general of the tract of land claimed by him, described as accurately as the same could be done in advance of the public surveys thereof; that said Bigelow personally resided upon and cultivated the said tract of land continuously from the first day of November, 1853, the time of his said settlement thereon, to the sixteenth day of February, 1860; and within three months after the survey thereof was made by the United States as a part of the public lands, he notified the register and receiver of the proper land-office of the precise tract of land claimed by him, and made his final proof of his said residence and cultivation, and of his having in all respects complied with the provisions of said act of congress, and the amendments

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thereto, so as to entitle him to a donation of said tract of land; that afterwards, on the fifth day of May, 1881, the United States issued to said Bigelow a patent for all of said land except a portion thereof embraced in a patent which was wrongfully issued by the United States to the missionary society of the Methodist Episcopal church on the ninth day of July, 1875, also except a portion thereof which is embraced in what is known as the Harney military reservation; that appellant, by direct and mesne conveyance from the said Bigelow, succeeded to his title to that portion of the donation claim which lies between the western boundary thereof and what is known as the United States military reservation and Fort Dalles, as established by Brigadier-General Harney in the year 1859, which last described land is the parcel of land in controversy; that said military reservation, established in 1859, adjoined what was then the southern boundary line of Dalles City, the respondent herein; that the eastern boundary line of said Harney military reservation, commencing at the northeastern corner thereof, runs thence south $13^{\circ} 30'$ west, 19.16 chains, where it intersects and crosses the western boundary of the Bigelow claim, and continuing on in the same course south $13^{\circ} 30'$ west, runs 53 chains from said point of intersection upon the said donation claim, and running thence north $68^{\circ} 34'$ west, 17 chains, where it re-crosses the said western boundary of the donation claim, and thereby includes in said military reservation about 44 1-2 acres of land belonging to appellant; that appellant is the equitable owner of said 44 1-2 acres of land, and that the legal title thereof is in the respondent by virtue of a grant made under an act of congress, entitled "An act to provide for the disposition of useless military reservations," approved February 24, 1871, and is entitled to a conveyance of the legal title from the respondent.

The respondent filed an answer to the said complaint, denying all the allegations therein contained; and for a further answer averred that no part of said land was subject to be taken as a donation claim, for the reason that at

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the time of the alleged settlement and filing thereon it was a part of a duly authorized and established military reservation known as Fort Dalles, which included ten miles square, was established by the president of the United States in 1848, and remained unchanged until sometime after the alleged settlement of the said Bigelow, and at the time thereof was actually occupied as such building, parade, and other grounds, a part of which was enclosed, and said enclosure included said grounds and the lands in controversy; that the east line of the part enclosed was commonly known as and called the eastern boundary line of the reservation; that in 1853 the said ten-mile reservation was reduced by the proper authorities to one mile square, the eastern boundary line of which reduced reservation conformed in all respects with the eastern boundary line of the part of the ten-mile reservation which was used for the particular purposes mentioned, and which was the most valuable and desirable part thereof. The respondent also charges in its said answer that the patent issued to said Bigelow was obtained by fraud and misrepresentation in certain particulars therein specified. Respondent further alleged that whatever interest it may have in said tract of land was obtained in the year 1871, since which time it has had the sole, exclusive and notorious possession of every part thereof; and that neither the appellant nor any of his grantors have ever been seized or possessed of any part of it for a period of more than ten years prior to the commencement of this suit.

The appellant filed a reply to the new matter contained in the answer denying the same.

The case was heard upon depositions, proofs and exhibits, upon which the circuit court found that the appellant had failed to sustain the allegations of his complaints, and thereupon decreed that it be dismissed, which is the decree appealed from.

J. K. Kelly, Appellant, *pro se*.

F. P. Mays, for Respondent.

THAYER, C. J., delivered the opinion of the court.

The decision of this case turns mainly upon the question as to whether the land claimed by the said Winson D. Bigelow as a donation claim was subject to be taken as such under said act of congress of September 27, 1850. Said Bigelow was doubtless a qualified person to take a claim under said act, and, so far as I am able to discover, performed all the conditions and requirements necessary under it to entitle him to the benefit of its provisions; but it is earnestly contended by respondent's counsel that the claim would not attach to the parcel of land included in his notification for the reason that it was a part of a tract selected for a military post, or at least was within one mile of land reserved for the governmental purposes, and therefore invalid.

The history of the case shows that on January 29, 1848, the then secretary of war, the Hon. W. L. Marcy, made and published an order that the commanding officer of the military stations established on the route to Oregon make a reserve of ten miles square around the same, and cause it to be surveyed and divided off into suitable portions, the boundaries of which to be clearly marked by natural or other objects and indicated by numbers on a map to be prepared for the convenience of future reference. A copy of this order was enclosed by the adjutant-general of the United States on February 2, 1848, to Lieutenant Colonel C. Wharton, 1st dragoons, commanding at Fort Leavenworth, directing him to furnish every commander of a post that might be established with a copy of the said order and to enjoin upon him a strict compliance with its requirements; that on June 22, 1850, Colonel Loring, commanding the 11th military department at Fort Vancouver, O. T., made a special order to the effect that Brevet Major S. S. Tucker, mounted riflemen, should, in establishing the military post at the Dalles of the Columbia river, make a military reservation of ten miles square; that he cause it to be surveyed by an officer of his command and

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designate its limits by prominent natural objects (if any) and strong posts; that a plat of the reservation be sent to headquarters at Vancouver. A survey and map were introduced in evidence at the hearing, purporting to be a survey and map of a ten-mile military reservation at the Dalles, and to have been made by Geo. C. Bomford, surveyor, in 1852. Upon this map was endorsed the following certificate: "This survey of the military reservation at this post was made by Mr. Geo. C. Bomford, under a contract made with him on the tenth of September, 1852, by First Lieutenant John B. Gibson, 1st artillery, then in command of this post, acting under the order of Brevet Brigadier-General E. A. Hitchcock, commanding the Pacific division, headquarters Dalles of the Columbia river, Oregon Territory, thirty-first of October, 1853.

(Signed)

"B. ALVORD, Captain,

"Brevet Major U. S. A., commanding."

It further appears that on the eighteenth day of May, 1854, the then secretary of war, Hon. Jefferson Davis, made and published an order as follows:

"WAR DEPARTMENT, }
"WASHINGTON, May 18, 1854. }

"General John E. Wool, Commanding Department of the Pacific—SIR: It is represented to this department that a reservation of ten miles square has been made for military purposes at the Dalles of the Columbia, and that possession of this tract is claimed by the military authorities to the exclusion of persons claiming parts thereof. You will please cause a tract of not exceeding six hundred and forty acres to be selected for the use of the post, avoiding, as far as consistent with the public interest, all interference with private claims, and cause the limits thereof to be properly marked. You will also please have a plat thereof made and forwarded to this department with such a description of the tract that it can be platted in its proper position on the maps of the public lands. The selection of this tract being made carefully, and after full examina-

tion by competent officers, you will cause the commanding officer to relinquish possession of any other lands held at that place. Should the reservation include the improvements of any settler, made previous to the reservation, you will cause the value thereof to be ascertained, if possible, in a manner satisfactory to the owner, and report the amount in detail to this department.

“Very respectfully, your obedient servant,

“JEFF’N DAVIS, secretary of war.”

The appellant concedes that in pursuance of this last order of the war department, a military reservation was duly established at the Dalles of the Columbia; but contends that no such reservation was established there prior to that time.

It appears that said Bigelow, on the twenty-second day of November, 1853, filed with the then surveyor-general of Oregon a notification of his claim to a donation of 320 acres of land under said act of congress of September 27, 1850, in which the boundaries of said claim were as follows: “Beginning at a point on the south bank of the Columbia river at a point where William C. Laughlin’s west line intersects the Columbia river; running thence south $32^{\circ} 30'$, west 105 chains; thence east 72 chains; thence north 52 chains; thence west 15 chains; thence north $36^{\circ} 50'$ east to the place of beginning,—containing 320 acres, as appears by the annexed diagram.”

Appended to said notification were field notes, purporting to be of a survey of said claim made September 4, 1853, by Justin Cheneworth. These notes were recorded in the land-office at Oregon City, October 6, 1853, and described the said claim as follows: “Beginning at the southwestern corner of W. C. Laughlin’s claim; thence south $32^{\circ} 30'$ adjoining the military reservation, including Fort Dalles, 210 two-pole chains; witness oak 18 inches in diameter; thence 144 chains to the southern boundary of John A. Simms’ claim, 13 chains north from the southwestern corner; witness oak 12 inches in diameter; thence along said boundary 107 [chains] to the northwestern

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corner of said claim; thence west along the south boundary of Laughlin's claim 30 chains to the southwestern corner; thence along the western boundary of said claim 73 chains to the place of beginning."

A plat was drawn in the margin of said field notes indicating the shape of the claim; and accompanying the said notification and field-notes was the affidavit of the said Bigelow, to the effect that he was a white settler on the public lands, and that he arrived in said Territory on the — day of October, 184—, and was a resident thereof on and before the first day of December, 1850; that he was a native-born citizen of the United States; that he was born in Massachusetts in 1823, and that he personally resided upon and cultivated that part of the public lands particularly described in his notification continuously from the second day of November, 1853, to the sixteenth day of February, 1860, and that he was not a married man.

It further appears that at the time of filing the said notification the lands upon which it was filed were unsurveyed lands of the United States, and that the same were not surveyed until February 4, 1860; that on the sixteenth day of February, 1860, said Bigelow filed with the surveyor-general of Oregon a notification of his claim to a donation of 320 acres of land, in which he described the same as "beginning at the northwest corner of the claim in section 3, 48.92 chains west 4.83 chains south of the corner of fractional sections 2 and 3; thence south 36.50 chains; thence east 16.25 chains; thence south 49.47 chains; thence west 71.02 chains; thence north 32° 30', east 101.82 chains to the place of beginning"; that said notification was accompanied by the affidavit of the said Bigelow in the form of settler's oath upon final proof and cultivation of the claim, also the affidavits of two witnesses as to such settlement and cultivation thereof as required by said act of congress.

There is testimony in the case tending to prove that at about the time said Bigelow filed his original notification, Lieutenant Montgomery of the 4th infantry, who was then stationed at the Dalles military post, by order of Brevet

Major Alvord, who was in command of the post, surveyed a line from the northwest corner of the McLaughlin donation claim one mile south, which was recognized as the eastern line of said reservation, and that it coincided with the west line of Bigelow's donation claim; that subsequently in the year 1854 or 1855, Major Rains, then in command at the post, caused a new survey of the reservation to be made, changing the line established by Montgomery and threw off a portion of it on the north for a townsite. It further appears that on the first day of January, 1859, certain parties petitioned the honorable secretary of war to relinquish to Dalles City that part of the said reservation lying between the first bluff and the Columbia river, and the bluff of rocks on the west bank of Mill creek and the line of the reservation, together with that portion lying east of a line extending from Second street south to a point parallel with the southern boundary of said city; and that on the second day of September, 1859, acting Secretary of War W. R. Drinkard made an order authorizing the commanding officer of the department of Oregon, at his discretion, to reduce the limits of the said reservation so as to leave the land referred to by the petitioners unoccupied; that the reserve, not exceeding one mile square, and including all the public buildings, should then be accurately surveyed, and the necessary plat and notes forwarded to the adjutant-general's office in order that it might be formally set apart for military purposes. The matter was referred to the commanding general by the assistant adjutant-general September 17, 1859. In pursuance of which order, General Harney ordered said reservation to be so surveyed, plats and notes to be transmitted to his office to be forwarded to the adjutant-general, that the reservation might be formally set apart for military purposes; that the northern limits of the reserve should not extend beyond the first bluff from the Columbia river, and should no inconvenience be found to arise to the military service when running the lines, the prolongation of Second street of the town of Dalles should mark the

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eastern boundary; and Brevet Second Lieutenant Joseph Dixon, corps of topographical engineers, was assigned to the execution of the duty. On the twentieth day of December, 1859, said Joseph Dixon reported that he had completed the survey and also the triplicate maps of the reservation.

Under this proceeding the limits of the said reservation seem to have been definitely established. It will be seen from an inspection of the maps and reports of the surveys that the east line of the reservation as established by Lieutenant Dixon is the same as that attempted to be established by Major Rains. They differ, however, in their extent north; the former one "does not extend beyond the upper edge of the first bluff from the Columbia river"; while the latter, traced from south to north, continues to the "most eastern extremity of the rock at the mouth of Mill creek." They also differ in their extent south; the Rains line stopping "at a rock on the brow of the bluff marked with a cross," and the Dixon line extending several chains further south. Whether the said east line of said reservation was changed by the Rains and Dixon survey in its termini and course, from the line thereof as surveyed and located by Lieutenant Montgomery, is a material question between the parties.

It is claimed by appellant and the evidence tends to show that Lieutenant Montgomery established the initial point of the line at the northwest corner of the Laughlin donation claim, and ran thence south $32^{\circ} 30'$ west, one mile; while it is shown that Major Rains established the initial point of the eastern boundary of the reservation at the "most eastern extremity of the rock at the mouth of Mill creek" and ran thence south, $14^{\circ} 23'$ west, 64 pole chains and 80 links to a certain point indicated upon the map prepared by him.

The starting point of the Rains and Dixon east boundary line of the reservation, regarded as a continuous line, is some distance west from that of the Montgomery line, but its bearing west is $18^{\circ} 7'$ less than that of the latter; in

consequence of which it cuts across the same; and its southern terminus is some distance further east than that of the Montgomery line at its southern extremity. This resulted in extending the easterly boundary of the southerly portion of the reservation on to Bigelow's donation claim as described in his notification, and the territory between said two lines south from the point where the Rains and Dixon line cuts across the Montgomery line constitutes the premises in controversy.

It further appears that at the time Bigelow filed his notification and made his final proof the missionary society of the M. E. church made a claim to about ninety acres off the northern and part of the western portion thereof. The claim of the said society was based upon an alleged occupancy of the land as a missionary station at the time of the establishment of the territorial government of Oregon under the act of congress of August 14, 1848, by virtue of a clause in the first section thereof, which provides: "That the title to the land, not exceeding 640 acres, now occupied as missionary stations among the Indian tribes in said Territory," etc., be confirmed and established in the religious societies to which said missionary stations respectively belong. That the matter was contested in the land-office and was finally decided by the secretary of the interior in favor of the latter, and a patent to the said 90 acres was thereafter and on the ninth day of July, 1875, issued to it. And afterwards and on the fifth day of May, 1881, a patent was issued to said Bigelow for the said claim except the portion thereof patented to the said missionary society and the portion included between the said lines as before mentioned.

It further appears that in September, 1877, two suits were commenced against the said missionary society, one of them by James K. Kelly, Aaron E. Wait and Orlando Humason, and the other by said Kelly and Wait to test its rights under the said patent as against the claim of the said Bigelow, to the land included in his said donation claim; the plaintiffs in the respective suits claiming under

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him, the said Bigelow. These suits were removed to the U. S. circuit court for the district of Oregon, where they were tried and a decree rendered to the effect that the said missionary society was the trustee for the plaintiffs therein of the legal title to said land, and that it convey the land to them; that an appeal was taken from the said decree to the supreme court of the United States and was there duly affirmed; the said last-mentioned court holding that the record clearly showed a full compliance by Bigelow with the law and established his right to the land in controversy which he afterwards conveyed to the appellees in the cases.

The evidence herein shows that in November, 1862, said Bigelow conveyed to appellant and said Wait the undivided one-third part of his said donation claim, except such portion thereof as he had previously sold; and that in December, 1864, he conveyed to said Humason the undivided two-thirds of the claim subject to the same exception; and that since said time and before the commencement of this suit the appellant had acquired Wait's interest therein and all the interest conveyed to Humason.

The allegation in the complaint that the land in controversy in this suit was claimed by the respondent Dalles City by virtue of an alleged purchase from the United States under the act of congress approved February 24, 1871, entitled an act to provide for the disposition of useless military reservations, seems to be sustained by the proofs in the case, although the respondent's counsel strongly contended to the contrary at the hearing. Said counsel insisted that the said act of itself was not sufficient to confer the legal title upon the respondent, and that there was no proof in the case that the latter had complied with its terms. I have not the act before me, and my only recollections of its terms are that it granted to the respondent certain lands, including the premises in question, upon the payment of five dollars an acre therefor. Whether the act is sufficient to convey the legal title to the land to the respondent without proof of the payment by the latter

of the five dollars an acre therefor, may be somewhat questionable, but I find among the exhibits in the case of *Kelly v. Pike*, which the parties herein stipulated should be used as evidence in this case, the following:

“U. S. LAND-OFFICE, Oregon, May 12, 1881.

“It is hereby certified that the records of this office show that by the act of February 24, 1871, authorities of Dalles City, Oregon, were allowed to make cash entry No. 1161, at Oregon City land-office on April 8, 1872: Part N. W. $\frac{1}{4}$ and part S. W. $\frac{1}{4}$ Sec. 3, and part N. E. $\frac{1}{4}$ and part S. E. $\frac{1}{4}$ Sec. 4, and part N. E. $\frac{1}{4}$ Sec. 9, and N. W. $\frac{1}{4}$ Sec. 10, all in township 1 N., of R. 13 E. W. M.; containing 162.51 acres at five dollars per acre, \$812.55, and paid therefor on said April 8, 1872, at the rate of \$5 per acre.

(Signed)

“F. A. McDONALD, register.”

Attached to this is a certificate in the usual form by the register as register of the U. S. land office at The Dalles, Oregon, to the effect that he had compared the same with the original entries made in the records of that office in said matter in the purchase of the land by Dalles City, and that it was a true and complete copy thereof, and the whole thereof, together with a map of the same. And to which was appended a small map or plat showing the location of the premises.

The counsel for the respondent has interposed several other objections to the appellant's right of recovery herein, but it seems to me that the question suggested in the outset, as to whether the land claimed by Bigelow could be lawfully taken as a donation claim, is the only one which in any wise is doubtful.

If the land claimed by Bigelow was, at the time he filed his first notification, a part of a military reservation, he had no legal right to settle thereon and attempt to take it as a donation claim under said act of congress of September 27, 1850; as section 14 of said act reserves such portions of the public lands as may be designated under the authority of the president of the United States for forts, magazines,

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arsenals, dock-yards, and other needful public uses, from the operation of the act. And section 9 of said act provides that such claim shall not attach to any tract or parcel of land selected for a military post, or within one mile thereof, or to any other land reserved for governmental purposes, unless the residence and cultivation thereof shall have commenced previous to the selection or reservation of the same for such purposes.

The legality of the attempt upon the part of Bigelow to take the said donation claim depends, therefore, upon the fact whether, on the second day of November, 1853, the date of his settlement, the land claimed by him had been designated under the authority of the president of the United States for the purposes mentioned, or had been selected for a military post, or was within one mile thereof, or had been reserved for governmental purposes.

It cannot be maintained from the proof that a military reserve of ten miles square was ever established at the point in question. No authority was shown for locating any such reservation at that place. The order of Secretary Marcy was only to the effect "that the commanding officer of the military stations established on the route to Oregon should make a reserve of ten miles square around the same," etc. The order was directed to the commanding officer of military stations which had been established, and established on the route to Oregon. It had no reference to stations of that character which were to be established at a particular locality in Oregon. The establishment of such a station required a special order under the authority of the President of the United States, and before we can conclude that any military station was established at the Dalles it must appear that such an order was promulgated by his authority. The adjutant-general, Mr. R. Jones, in referring the matter to Colonel Wharton, used, it is true, the words "to be established on Oregon route"; but that was not the order made by the honorable secretary of war. The order of Colonel Loring to Major S. S. Tucker that he would, "in the establishment of the mili-

tary post at the Dalles of the Columbia river, make a military reservation of ten miles square," does not appear to have been made in accordance with any authority competent to select land for a military post, and the subsequent order of the then secretary of war, Jefferson Davis, dated May 13, 1854, indicates that none had been given, although he recognized the fact that a reservation of ten miles square had been made for military purposes at the Dalles of the Columbia, and that possession of such tract was claimed by the military authorities to the exclusion of persons claiming parts thereof.

The inference to be drawn from the proofs in the case is, that the military authorities located a site at the Dalles of the Columbia for a military post; that they entered into occupation of it with the expectation that a tract or parcel of land would ultimately be selected by the president of the United States at that point for such purpose. Until such time its limits could not be defined and fixed. It was doubtless in view of such selection being made that Bomford, in pursuance of a contract with Lieutenant Gibson, surveyed the tract of land shown upon the map prepared by him October 31, 1852, and that the surveys and maps before referred to were made. This work was all done without any authority from the president except the survey and map made by Lieutenant Dixon. That work was done by the acting secretary of war, Hon. W. R. Drinkard. In the order made by the latter, dated September 22, 1859, after authorizing the commanding officer of the department, at his discretion, to reduce the limits of the reservation, etc., directed that "the reserve, not exceeding one mile square, and including all the public buildings, be accurately surveyed and the necessary plat and notes forwarded to the adjutant-general's office at Washington, in order that it might be formally set apart for military purposes. This order was referred to the commanding general of the department, General Harney, for execution, who assigned Lieutenant Dixon to execute the duty, and subsequently forwarded the map of the military reserve at

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Fort Dalles, as so laid off, to the adjutant-general at Washington City, D. C. It is apparent that until this time the site of the reservation was not regarded as having been authoritatively established. If it had been, Bigelow, Laughlin, and Simms would not have been likely to have taken donation claims in so close proximity to it, nor the surveyor-general of Oregon have allowed their notifications thereon to be filed in his office and proof made of their compliance with the provisions of the donation law. Bigelow certainly knew he could not take a donation claim upon a military reservation, nor within one mile of a military fort, duly established as such, and it is not probable that he attempted to do so, and highly improbable that the land department would permit it to be done. The fact that he obtained a patent to the larger part of the claim notified upon, and that his grantees established in the United States courts that, by virtue of his settlement, residence and cultivation, he was entitled in equity, under the donation act, to the part thereof patented to the missionary society of the M. E. Church, are very convincing proofs that his settlement was lawful; which could not have been the case if the site for the post had been formally set apart by the proper department for military purposes. And if his settlement were lawful under the said act, his claim could not be rightfully encroached upon by the secretary of war or the president, any more than it could be rightfully claimed by the missionary society under the decision of the secretary of the interior, and the patent issued in accordance therewith.

The settlement and compliance with the law authorizing it, secured to Bigelow and his grantees a vested right in the claim notified upon, of which they cannot be deprived by the exercise of any power of the government for any purpose without payment of just compensation. Nor did the secretary of war, acting under the authority of the president, have power to include in the said reservation any part of the claim of the said Bigelow after his settlement thereon and the filing of his notification, if the

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settlement were legally made without his relinquishments thereof; or making to him such compensation therefor.

The part of the donation claim included in what is known as the "Harney reservation," as surveyed and platted by Lieutenant Dixon, equitably belongs, in my opinion, to the appellant as grantee, directly and indirectly, from said Bigelow; and he is entitled to the relief prayed for in his complaint.

I think, however, that, as the respondent Dalles City has paid to the United States at the rate of \$5 per acre for the land in controversy, it should not be required to pay costs and disbursements herein; but that the appellant should be required to pay all disbursements in this court and in the circuit court.

A decree will be entered herein in accordance with the principles of this opinion.

[Filed May 23, 1890.]

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J. L. ROE, RESPONDENT, v. UNION COUNTY, APPELLANT.

COUNTY COURT—AUTHORITY TO ESTABLISH COUNTY ROAD AND PAY DAMAGES OUT OF THE COUNTY TREASURY—WHEN.—A county court has no jurisdiction to establish a county road unless satisfied that it will be of public utility; that the amount of damages assessed for opening it is just and equitable, and that it will be of sufficient importance to the public to cause the damages so assessed to be paid by the county; in which case it must order the same to be paid to the complainant out of the county treasury.

COUNTY COURT—WHEN IT MAY REQUIRE PETITIONERS FOR PUBLIC HIGHWAY TO PAY THE DAMAGES ASSESSED.—The court may, however, where it is of the opinion that the proposed road is not of sufficient importance to the public to cause the damages to be paid by the county, establish it as a public highway; but it can only do so in that case where the expenses or damages, or such part thereof as it may think proper, are paid by the petitioners. The court may in the latter case, by a supplemental order reciting the facts, establish the road; but this must be done at the term of court at which the preliminary determination is had.

APPEAL from Union county: JAS. A. FEE, judge.

The respondent sued out a writ of review from the circuit court to the county court to review certain proceedings had in the latter court for the laying out of a county road in said county in compliance with the following petition signed by O. H. Fay and more than twelve others:

Statement of facts.

"To the Honorable the County Court of the State of Oregon for Union County: The petition of the undersigned householders of Union county, Oregon, residing in the vicinity of the road hereinafter described, hereby petition your honorable body to cause to be laid out and located and established a county road in said county of Union, on the following described line, to wit: Commencing at the center corner of the northeast quarter of section 9, in township 2 south, of range 39 east, of the Willamette meridian; thence running west one and one-half miles to the center corner of the northwest corner of section 8, in said township and range; thence running south one fourth mile to the southeast corner of the southwest quarter of the northwest quarter of section 8 in said township and range; and your petitioners also pray that the following-described portions of what is known as the Knapp road may be vacated and discontinued, to wit: Commencing at the center corner of the southeast quarter of section 9 in township 2 south, of range 39 east, of the Willamette meridian; thence running west one and one-half miles to the center corner of the southwest quarter of section 8 in said township and range."

Viewers were duly appointed to locate the road, who, on the seventh day of October, 1885, filed their report recommending its establishment. On October 12, October 26, November 4, 1885, respectively, G. W. Ruckman, J. W. Mitchell, and R. D. Ruckman, and on November 6, 1885, the respondent herein, J. L. Roe, each presented a claim for damages which they were liable to suffer in consequence of the said road crossing their respective premises. Subsequently and on the fourth day of November, 1885, an order was made by the county court, then in session, appointing viewers to assess such damages; but they failed to make any report in the matter. On the eighth day of January, 1886, others were appointed for the same purpose, who, on the tenth day of the same month, submitted a report allowing G. W. Ruckman, J. W. Mitchell, and R. D. Ruckman each \$50. Upon the filing of this report the

Statement of facts.

county court ordered that the viewers' and surveyor's report and the plat of the road be recorded, and the road be established as a public highway; *provided, however*, that the petitioners for said road pay the damages awarded. Thereafter on March 7, 1888, G. W. Ruckman and J. W. Mitchell filed with the court the following relinquishment:

"We, the undersigned, do relinquish all our right of damages on road petitioned for by O. H. Fay and others.

(Signed)

"G. W. RUCKMAN.

"J. W. MITCHELL."

Thereupon and on the sixth day of April, 1888, the said court made the following order in the matter: "This matter coming on to be heard at this time, and it appearing to the court that the above-entitled road was regularly petitioned for, laid out and established as a county road, but that there were certain claims for damages, all of which have been withdrawn except R. D. Ruckman's which has been appraised at \$50, it is ordered by the court that a warrant be drawn on the treasurer in favor of said R. D. Ruckman for said sum of \$50, and that said road be ordered opened and declared a public highway."

On May 16, 1888, a motion by respondent and others was filed in said court, based on a remonstrance, that the court reconsider the said order of April 6, 1888, but no action was taken in the matter. The respondent then sued out the writ of review from the said circuit court to the said county court, to review the said proceedings, and assigned, among other grounds of error, the following: "The court erred in making the order of April 6, 1888, as all the rights of the petitioners therein were lost by lapse of time; and there being no jurisdiction in the court to make the said order or to pay the said \$50 damages from the county funds, and said order being in violation of and in conflict with the said order of March 6, 1886, and the court having no jurisdiction of the parties in interest." Upon the hearing of the said writ of review, the circuit court reversed

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the said order of the county court of April 6, 1888, which is the decision appealed from.

J. W. Shelton, for Appellant.

R. Eakin and Cage Baker, for Respondents.

THAYER, C. J., delivered the opinion of the court.

The order of the county court of April 6, 1888, was erroneous and the circuit court properly annulled the same. Said county court on March 6, 1886, had in effect determined that the proposed road would not be of sufficient importance to the public to cause the damages assessed and determined by the viewers to be paid by the county, although such was not its terms. A county court in a proceeding to lay out a public road, before attempting to establish the same, must be satisfied that it will be of public utility. It must then be satisfied that the amount of damages assessed for the opening of the road is just and equitable, and that the proposed road will be of sufficient importance to the public to cause the damages so assessed to be paid by the county, in which case it will order the same to be paid to the complainant out of the county treasury. The court may, however, where it is of the opinion that the proposed road is *not* of sufficient importance to the public to cause the damages to be paid by the county, establish it as a public highway; but it cannot do so in the latter case unless the expense or damages, or such part thereof as it may think proper, be paid by the petitioners. The order of the county court of the sixth of March, 1886, instead of directing "that the viewers and surveyors report and the plat of the road be recorded and established as a public highway, provided the petitioners pay the damages awarded," should have concluded as follows: "But the court being of the opinion that the proposed road is not of sufficient importance to the public to cause the damages to be paid by the county, it refuses to establish the same as a public highway unless the damages be paid by the petitioners." In that case it

Points decided.

would have been left with the petitioners whether or not the road should be established; and if the petitioners then came forward and paid the damages, the court could, by a supplemental order reciting the facts, have established the road. The matter, however, should have been consummated immediately, or at least during the term of court then in session. The said order, last referred to, was not in the form suggested, but it could not have any different legal effect, as the court could only do those things which the law authorizes it to do. It was, therefore, no more in fact than an intimation from the court that it would establish the said road upon compliance with the condition therein contained, and it had no authority to do so without such compliance being made during that term of the court. The order therefore of April 6, 1888, was a nullity.

The decision appealed from will be affirmed.

[Filed June 10, 1890.]

A. J. SULLIVAN, RESPONDENT, v. THE OREGON RAILWAY & NAVIGATION COMPANY, APPELLANT.

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RAILROADS—WHEN THE DUTY TO FENCE IS IMPLIED.—A statute which prescribes, as a precautionary measure, what shall be deemed a sufficient fence to protect a railroad track from the entrance of live stock, and declares an absolute liability for the killing of stock for the failure to fence, or for killing stock on an unfenced track, except for contributory negligence, or misconduct, imposes by implication the duty to fence as much as if such duty was expressly declared.

SECTIONS 4044, 4045, AND 4048, HILL'S CODE, CONSTRUED.—Section 4044 makes a railroad company liable for the value of stock killed upon or near any unfenced track by a moving train, and section 4045 prescribes what shall be deemed a sufficient fence to guard the railway track from the entrance thereon of live stock, and section 4048 provides that in every action for the value of any stock mentioned in section 4044, so killed, that proof of such killing shall be deemed and held conclusive evidence of negligence, except when the owner is guilty of negligence or misconduct; *And*, that the statute in prescribing the fence, and declaring that stock killed "on or near any unfenced track" shall be conclusive evidence of negligence, by implication, makes it the duty of a railway to fence its track. A statute often speaks as plainly by inference and by means of the purpose which underlies the enactment as in any other manner.

RAILROAD COMPANY—DUTY TO FENCE ROAD—POLICE REGULATIONS.—Such a statute is intended as a precautionary measure to protect the track from stock where allowed to roam at large so as to insure safety in the running of the trains as well as to prevent the destruction of live stock, and is a police regulation, which finds its

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authority in the same power as regulates the storage of gun powder, or other dangerous instrumentalities, and is not obnoxious to the constitutional objection of depriving the company of its property without due process of law, or of denying it the equal protection of the laws.

HINDMAN v. R. R. Co., 17 Or. 619 APPROVED AND FOLLOWED.—Under the statute in view of the construction given in *Hindman v. Railroad Co.*, 17 Or. 619, when it is alleged and proven that stock is killed or injured at a place where the company has failed to fence, but the duty existed,—an unfenced track,—a case of negligence is made out unless the defendant can show contributory negligence or misconduct.

PLACE OF ENTRY OF STOCK ON TRACK—WHEN MATERIAL.—Proof of the place of entry of the stock only becomes material and devolves on the plaintiff when stock is killed or injured at a place where the railroad company is not bound to fence, as a public highway, which has entered where its track was unfenced and the duty to fence existed, and such killing or injury is the direct consequence of omission to fence.

APPEAL from Umatilla county: JAS. A. FEE, judge.

The action was to recover damages for the killing of a stallion by the defendant railroad, belonging to the plaintiff, based upon the act of 1887, and found in Hill's Code, §§ 4044 to 4049, inclusive. Upon issue being joined, a trial was had, and the plaintiff recovered judgment, from which this appeal is brought.

W. W. Cotton and Gilbert & Snow, for Appellant.

* *Ramsey and Wager*, for Respondent.

LORD, J., delivered the opinion of the court.

There are two questions suggested by the defendant upon this record for our determination. These will be examined in the order discussed. The first is, that the act of 1887, in relation to killing stock upon or near any unfenced track of any railroad, and found in Hill's Code, as sections 4044 to 4049, inclusive, is unconstitutional. Section 4044 provides as follows: "Any person, * * * or corporation, * * * owning or operating any railroad within the State of Oregon shall be liable for the value of any horses * * * killed * * * upon or near any unfenced track of any railroad in this State whenever such killing or injury is caused by any moving train or engine or cars upon such track." Section 4045 is as follows: "No railroad shall be deemed fenced within the meaning of this act unless such track is guarded against the entrance thereon of any such live stock on either side

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of said track, and not more than one hundred feet distant therefrom; *provided*, that whatever is a lawful fence under the laws of this State in the county where such killing or injury shall occur, and no other, under the laws of this State shall be deemed and held a lawful fence under this act; *and provided further*, that complete natural defenses against the entrance of such stock upon said track, such as natural walls or deep ditches, shall be deemed and held to be a fence under this act, when the same, in connection with other and ordinary lawful fences, form a contiguous guard and defense against the entrance of such live stock upon the track." It is claimed by counsel for the defendant that these sections are unconstitutional, for the reason that they are in conflict with the fourteenth amendment of the constitution of the United States (1), in that they deprive the defendant of its property without due process of law, and (2) in that they deny to the defendant the equal protection of the laws. As corporations are persons within the meaning of the clause in question, they are entitled to invoke the benefit of its provisions. *Santa Clara Co. v. Railroad Co.*, 118 U. S. 394, 396. The defendant then is within its protection. The alleged conflict of these sections, or the act of 1887, with the fourteenth amendment, ordaining that no State shall deprive any person of his property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, is supposed to lie in discriminating against the defendant by imposing a liability where no duty is required by law, or without any act of negligence on its part. The contention is, that the act of 1887 imposes no duty upon the defendant to fence its track, yet it declares that the company shall make reparation for the killing of stock in the prosecution of its lawful business, without any fault or negligence on its part, or the violation of any duty imposed by law. As the defendant has the lawful right in a lawful way to run its trains, in order to hold it liable for the value of stock killed caused by the running of its trains, there must be some violation of a duty imposed by law, or some act of

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negligence on its part. And, it would follow, unless the act imposes some duty, the violation of which renders the defendant liable, it would be open to the objection that it subjects the defendant and its business to a liability where no wrong has been committed, or duty unperformed, thereby depriving it of its property and the equal protection of the law afforded to others.

That the legislature, in the exercise of the police power of the State, may require all railroads to fence their track, and for neglect or failure to perform this duty, render them liable for whatever injury is done, or for double the value of the stock killed, and that such legislation is not obnoxious to the clause of the constitution in question, has been frequently decided and cannot be questioned. The danger attending the running of steam railway cars and liability to serious injury, or loss of life of its passengers by collision with animals straying upon its track where allowed to roam at large, makes it a requirement of duty to exercise the utmost care, and to take every precaution to keep its track clear, so as to prevent accidents from such collisions. How can this be better done, and the track kept comparatively secure from stock going upon it than by requiring the railroad company to fence its track, and in default thereof to hold it liable for the value of the stock killed by such collision, when the plaintiff is not contributorily negligent? Such a precaution, where stock is allowed to run at large, is a police regulation, and, as a security against the loss of life and property in the operation of dangerous machinery, is based upon the same principle and finds its authority in the same power which regulates the storage of gunpowder, or other dangerous explosives. This being so, the legislature may require railroad companies to enclose their tracks with fences and provide that they may be held liable for all stock killed caused by their neglect to maintain such fences; and if the act in question has imposed this duty on the defendant and attached a liability for its neglect, it is a valid exercise of the police power, and not

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subject to the constitutional objection urged. The real inquiry then is: Does the act of 1887, as found in the sections, *supra*, inclusive, undertake to impose any duty upon railroad companies to fence the line of their track, and for failure to discharge this obligation render them liable for the value of the stock killed? While the act does not declare the duty of the defendant railroad company to fence its track in express terms, it is sufficient, and forms part of the statute, if it makes it the duty of the defendant to do so by implication. "An implication," said Folger, J., "is an inference of something not directly declared, but arising from what is admitted or expressed. Thus, when a statute, looking beyond the question of revenue for the public health or morals, inflicts a penalty for doing an act, though that act be not in terms prohibited, yet is unlawful, for the penalty implies a prohibition. *Griffith v. Wells*, 3 Denio, 226. And the principle is, that, as the law will not punish an act which it is lawful to do, when it does punish it the act must of necessary implication be unlawful," *Matter of City of Buffalo*, 68 N. Y. 173. So a statute which prescribes, as a precautionary measure, what shall be deemed a sufficient fence to protect a railroad track from the entrance of live stock, and declares an absolute liability for the killing of stock for the failure to fence, or for killing stock on an unfenced track except for misconduct, or contributory negligence, imposes, by implication, the duty to fence as much as if such duty was expressly declared. A duty which is implied from what is expressed in a statute forms a part of it and is as obligatory as if directly enjoined and declared. Section 4044 makes the defendant, as a railway corporation, liable for the value of stock killed on or near any "unfenced track," and section 4045 prescribes what shall be deemed a sufficient fence to protect the railway track from the entrance thereon of live stock, and section 4048 provides, in substance, that in every action for the value of any stock mentioned in section 4044 and killed on an unfenced track, proof of such killing shall be deemed and held con

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clusive evidence of negligence on the part of the company, except when the owner is guilty of contributory negligence, or misconduct contributing to the injury. The fence defined in section 4045 was intended to guard the railroad track "against the entrance thereon" of live stock, as a precautionary measure to avoid liability to accidents, and when erected and maintained as prescribed, obviates the liability created by section 4044 by converting the "unfenced" into a fenced track.

There is no liability for the killing of stock, except where there is a failure to fence, or on an "unfenced track," and it is for the omission of an "unfenced track," or the failure to fence it, that creates the liability, except for misconduct or contributory negligence. As then it is only "unfenced tracks" to which the liability attaches when the owner is not guilty of contributory negligence, or misconduct, contributing to his injury, it is the failure of the defendant to fence its track, or the negligence in allowing it to be exposed as "an unfenced track" for the entrance of live stock, that renders it liable for the value of such stock when killed by a collision with its trains. The statute declares what kind of fence will be deemed sufficient to guard the track from stock going upon it, and, by implication, if fenced as prescribed, will avoid the liability declared as to "unfenced tracks"; that is, if the defendant railroad company will erect and maintain the fence prescribed by the statute along the line of its track, it ceases to be liable under the preceding section. It does not make the company absolutely liable for the stock killed on its track, but the liability attaches only when the road is unfenced,—when the precautionary measure prescribed by the statute to avoid accidents and collision with such stock is neglected and unperformed,—and the owner is not contributorily negligent or guilty of misconduct. The duty, then, to fence is plainly implied, and the liability is imposed for the failure to do it. Negligence is the failure to perform some act required by law, or the doing of an act in an improper manner. When

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the statute prescribes the fence, and declares stock killed on "an unfenced track" shall be conclusive evidence of negligence, by implication, it makes it the duty of the company to fence its track, because one cannot be deemed guilty of negligence unless a duty has gone unperformed or neglected. "A statute," it is said, "often speaks as plainly by inference and by means of the purpose which underlies the enactment as in any other manner." *U. S. v. O'Conner*, 31 Fed. Rep. 451. And so here, the duty to fence is as plainly inferred as if it had been declared in express language, and the liability only attaches for disregarding it, and leaving the track unfenced.

In Iowa the statute is as follows: "Any corporation operating a railway that fails to fence the same against live stock running at large at all points where such right to fence exists, shall be liable to the owner of such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, unless the same was occasioned by the wilful act of the owner or his agent; and in order for the owner to recover, it shall only be necessary for the owner to prove, etc., and if such corporation neglects to pay, etc., such owner shall be entitled to recover double the value of the stock killed or damages caused thereby." Code of Iowa, 1289. In *Welsh v. Railroad Co.*, 53 Iowa, 634, the action was to recover double the value of a horse alleged to have been killed by one of the defendant's engines at a point where it had the right to fence its road, and the court below instructed the jury that it was the duty of a railroad company to fence its road against live stock running at large at all points where such right to fence exists; and it was objected to this instruction that no such duty exists, and the court say: "While it is true the statute does not impose an abstract duty or obligation upon railway companies to fence their roads, yet, as to live stock running at large, a failure to fence fixes an absolute liability for injuries occurring in the operation of the road, by reason of the want of such fence. The corporation owes a duty to the

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owners of live stock running at large, either to fence its road or pay for injuries resulting from the neglect to fence." And in *Bennett v. Railway Co.*, 61 Iowa, 356, the court say: "We think the only proper construction of the statute is, that in order to escape liability, the company must not only fence but keep the road sufficiently fenced; and this has been more than once ruled." This statute does not, in express terms, declare the duty of the railway companies to fence their tracks, but it is implied as a reasonable means to keep its track clear and insure safety in the movement of its trains.

In *Railroad Co. v. Beckwith*, 129 U. S. 26, the validity of the statute was assailed, as here, as being in conflict with the first section of the fourteenth amendment of the constitution of the United States, and it was held not subject to that objection, but a valid and reasonable exercise of the police power of the State for the protection of its citizens. Mr. Justice Field, in delivering the opinion of the court, among other things, said: "The tremendous force brought into action in running railway cars renders it absolutely essential that every precaution should be taken against accident by collision, not only with other trains but with animals. A collision with animals may be attended with more serious injury than their destruction; it may derail the cars and cause the death or serious injury of passengers. Where these companies have the right to fence their tracks and thus secure their roads from cattle going upon them, it would seem to be a wise precaution on their part to put up such guards against accidents at places where cattle are allowed to roam at large. The statute of Iowa, in fixing an absolute liability upon them for injuries to cattle committed in the operation of their roads by reason of the want of such guards, would seem to treat this precaution as a duty. * * * But the obligation of the defendant railway company to use reasonable means to keep its track clear, so as to insure safety in the movements of its trains, is plainly implied in the statute of Iowa, which also indicates that the putting up of such

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fences would be such reasonable means of safety." And again: "As it is thus the duty of the railway company to keep its track free from animals, its neglect to do so, by adopting the most reasonable means for that purpose,—the fencing of its roadway, as indicated by the statute of Iowa,—justly subjects it, as already stated, to punitive damages, where injuries are committed by reason of such neglect." And so here, the duty of the defendant railway company to use reasonable means to keep its track clear by fencing it as indicated by the statute, and thereby avoid the liability to accidents from stock running at large and straying upon its track, is plainly implied as the proper means to secure safety, and its neglect to do so by leaving its track unfenced, justly subjects it to the liability fixed for the injury committed. Nor is the case of *Bellenberg v. Railroad Co.*, 8 Mont. 276, relied upon by appellant's counsel, in conflict with the view suggested. There the statute was different, and in effect declared that any railroad corporation shall make reparation to the owner of any stock for any injury inflicted in the prosecution of its lawful business without any fault or negligence on its part. It was as follows: "Every railroad corporation or company operating any line of railroad or railway, or any branch thereof, within the limits of this Territory, which shall damage or kill any horse * * * by running any engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof." As there was "no law," as the court say, "in the Territory which compels railroads to fence their lands," and as the statute in question did not make it their duty, either expressly or impliedly, to fence its track, it required the court, to sustain such statute, "to lay down the doctrine that the legislature can inflict a penalty upon one who is doing a lawful act in a lawful manner," which the court refused to do.

The liability of railway corporations, under this statute, did not attach for the violation of any law, or the neglect to perform any duty, or for the want of proper care in

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running its trains, but they were mulct in damages without any wrong or fault, when engaged in the lawful prosecution of their business, and when no one else was so liable under such circumstances. The same may be said of *Railway Co. v. Lackey*, 78 Ill. 55, and *Zeigler v. Railroad Co.*, 58 Ala. 595; *Jensen v. Railroad Co.*, Utah S. C. 1889, which were under like statutes. Nor is *Hindman v. Railroad Co.*, 17 Or. 619, in conflict with the construction we have given to our statute. It is true that THAYER, C. J., in the course of his opinion, said that "fencing the railroad track is not imposed upon the company as a duty," that is, not directly or expressly imposed as a duty; "but," he observes, "it is the fact"—that is, the killing of stock on an unfenced track by a moving train—"which of itself establishes conclusively that the company is guilty of negligence." This could not be so unless some duty was neglected, and it must therefore be implied. The theory of the argument is only consonant with this hypothesis. Its meaning plainly is, that when stock are killed at a place where the duty to fence has been neglected by the company, that an absolute liability attaches—"it is this fact which of itself establishes conclusively that the company is guilty of negligence." The result is, that we think that the statute in question is not obnoxious to the constitutional objection suggested, but that in devolving a liability for the violation of the duty to fence, it is a valid and reasonable exercise of the police power of the State, intended to guard the track against live stock, so as to insure the safety of the lives of passengers and property involved in the running of its trains, as well as to prevent the destruction or loss of such property by collision with moving trains or cars.

The next objection embraces exceptions to instructions given, and instructions asked and refused. These instructions are as follows: "Under the laws of this State, in an action like this, proof of the killing of the horse by the defendant's moving engine or cars, and that the place where the horse entered on the track was not fenced, is conclusive proof of negligence on the part of the defendant

corporation, unless the point where the horse entered and was killed was a county road or public highway.

"3. In this case, if you find from the testimony that the horse entered upon the track of the defendant at a point some distance from where he was struck and killed, and some distance from any county road or public crossing, and that soon after he entered thereon the defendant's train came along, and that the horse ran along upon said track where it was unfenced in front of said train until he was struck and killed by it, and that he entered upon said track from a common unfenced range, then you should find a verdict for the plaintiff for the full value of said horse at the time he was killed.

"4. I charge you that if the horse entered upon the defendant's unfenced track from a common unfenced range, at a point where there was no public road or public crossing, and being on said track at said point ran from there along and upon said unfenced track in front of the defendant's train at a point at or near a public road and was there struck by the defendant's engine or cars and was killed, then the defendant is liable for the value of said horse. And the fact that he may have been struck in the edge of the public road affords no defense, provided he got on the track and ran along it and was struck as aforesaid."

The court also charged to the effect that the section of the Code referred to did not apply to public crossings, etc., and that the owners or operators of railroads were not liable for killing stock on public highways unless guilty of negligence, or a want of ordinary care, and that if they found from the evidence that the plaintiff's stallion was upon the track at a point where a public highway crosses the same and was there struck and killed by a moving train, the fact that the track was unfenced at that point is no evidence of negligence.

The defendant claims error in the refusal of the court to give the following instruction: "The mere fact that plaintiff's stallion was struck by a moving train or engine

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on the railroad track of the defendant at a point where the defendant had no legal right to fence the same, is not sufficient evidence of negligence to warrant you in finding a verdict for the plaintiff. If, therefore, you find from the evidence that the plaintiff's stallion was struck and killed by a moving engine or train on the track of defendant's railroad at a point where the same was unfenced, and that such point was a public highway, then the defendant had no legal right to fence, and your verdict must be for the defendant. To entitle the plaintiff to recover in this action, he must show that the stallion was struck by a moving train on defendant's railroad track, at a place other than upon a county road or public highway. The *onus* of proof is upon the plaintiff, and unless he shows by a preponderance of the evidence that the stallion received the injury which caused his death at a point other than on a public highway, your verdict must be for the defendant."

Upon the facts as exhibited by this record, the position of the trial court was that if the stallion entered upon the track at a point where there was no fence, but where the duty to fence existed, although it might be killed at a place afterwards where the statute made no requirements to fence, as a public highway, the defendant company would be liable. While the counsel for the defendant was contending for a literal construction of the statute, namely, that the statute specified that it was the killing of the stock upon or near an unfenced track, and as a track crossing an unfenced highway was an unfenced track, it was within the letter of the law; that the plaintiff, to bring himself within the statute, must show that his stock was killed on an unfenced track, and that by reason of the instructions, as given and refused, the defendant was prejudiced under the evidence as to whether the animal was killed on a public highway. The statute is: * * * "shall be liable * * * for any horse * * * killed upon or near any unfenced track," etc, and is broad enough, construed liberally, to include highways, or depot grounds. But, as the court charged, such a construction is incon-

sistent with the reason of the statute and the purpose underlying its enactment.

It was, therefore, held in *Moses v. Railroad Co.*, 18 Or. 385, that the statute did not apply to such places; that railroad companies were not required to fence their depot grounds or public road crossings, and as a consequence were not liable to pay for live stock which may wander upon the track at such places and be killed without negligence on their part. Such places, then, must be considered without the operation of the law, or the requirement to fence to guard the track from the entrance of stock thereon. To give the statute the construction contended for it would make it apply to places where the duty to fence is not required, as a public highway, where the track is necessarily unfenced to accommodate the public convenience. Proof that stock wandered on the track at such place and were killed would not render the railroad company liable, and the court so instructed the jury. It is at such places as the company is bound to fence and fails to observe that requirement of the law, whereby stock enter upon the track and are killed, which constitute the liability. As highways are excepted from its operation, there could be no liability for stock which may enter upon the track at a public highway and be killed; that result, if it occurred on a public highway, could only arise where the stock entered upon the track at some place where the duty to fence was neglected, and the animal running down the track was struck by the engine and killed at some place where the duty to fence did not exist, as a public highway or depot grounds. In such case the killing of the stock is the natural and proximate result of the duty neglected in failing to fence where the law required it; it is the want of a fence that has caused the injury. Hence, the theory of the court that if the horse strayed upon the track at a point where the company was bound to fence but had neglected to do so, it was liable, irrespective of the place at which the horse may have been killed. But it by no means follows, nor did the court so rule, that if stock

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was killed at a place where the duty to fence existed, but had been neglected, that a case of negligence was not made out. While, under the statute, the duty to fence is not declared in mandatory terms, it is implied from the omission to fence, or leaving the track unfenced, whereby stock may enter thereon and be killed. It is, therefore, the failure to fence, where stock are "killed upon or near any 'unfenced track'" where the duty to fence existed, that constitutes the negligence and fixes the liability, the implication being the stock entered upon the track at the place where they were killed, and the requirement to fence was neglected. The action is prosecuted upon the omission to fence, so that when it is proven that the stock were killed at a place where the company is obliged to fence, but where it is not fenced—"an unfenced track"—the statute says that "such proof shall be deemed and held to be conclusive evidence of negligence." This is upon the assumption that the company have failed to fence and keep the stock off of the track at a point where it was the duty of the company to fence, and where the cattle entered and by reason thereof were killed. It is true that in some jurisdictions under their statutes it is held that the point of entry must be alleged, and that the evidence must distinctly show that the stock got upon the track at a point where there should have been a fence, but there was none, otherwise the plaintiff cannot recover. But under our statute, and in view of the construction already given to it in *Hindman v. Railroad Co.*, *supra*, where the facts to be alleged and proved are stated, when stock is killed or injured at a place where the company has failed to fence, but the duty to fence existed, a case of negligence is made out, unless the defendant can show contributory negligence or misconduct.

If, then, the proof showed that the horse was killed by a moving train at a place where the track was unfenced, or where there was a failure to fence, and the law required it to be fenced, the defendant is liable; or, if the horse got on the track and was killed at a public crossing, as the

court charged, the defendant is not liable. But if the horse got on the track where the duty to fence was neglected, and the horse was run down and struck by a moving engine and killed at a public highway, the injury originating in the failure to fence is the proximate cause of the injury, and, as the court charged, the defendant is liable. Under our statute, proof of the place where the horse got on the track only becomes material when the horse is killed at a public place or crossing, and the claim of the plaintiff is that he got on the track at a place where the law required a fence, and that his killing at a public crossing was the direct and natural result of an omission to fence. Such place being without the statute, the plaintiff, to bring the injury within its operation, would be required to show that it was caused by an omission to fence where the duty existed. In effect, the court charged this, but it did not charge, as there was evidence tending to show, that if the horse was killed where the duty to fence was neglected, a case of negligence was made out, and that the defendant was liable. The truth is, there is no pretence that the railroad is fenced anywhere in this region, and upon the facts, as disclosed by this record, how the defendant was prejudiced it is difficult to understand. Under our view of the law, the court by its instructions required stricter proof of the plaintiff than the statute would require in case the horse was killed where the duty to fence was neglected. As to the first instruction asked by the defendant and refused, in the first part it assumes a fact disputed, and in the last is covered by instructions given. As to the other two, the court does charge that the injury must have occurred from the omission to fence, which excludes injuries originating on highways to which the statute does not apply. Injuries originating from a failure to fence, although occurring on a highway, are tied to the causes away from it, and held within the operation of the law, so that the plaintiff to recover, must show that the inception of the injury or its cause was at a place where the duty to fence was neglected,

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which shows that it did not originate on a highway, but owes its occurrence and existence to causes away from it. Some of the authorities indicate that when the want of a fence is shown, and the injury is proven as the direct consequence of it, if the defendant thinks it occurred where no fencing is required, as on a public highway, that to avoid the liability thereby established the defendant ought to be required to show it. Referring to cases of this character, Mr. Rorer says: "When the absence of a fence is shown, and the injury is proven, then if the defendant will avoid liability by showing the occurrence to have originated at a place where fencing was not required, or was not allowable, as a public highway, or other public place, then the burden of proof is on the defendant to prove these facts; and if not absolutely necessary, yet it were the better practice to plead them." 2 Rorer on Railroads, p. 1399. But however this may be, we are unable to see that there was error, and the judgment must be affirmed.

[Filed June 10, 1890.]

AMERICAN MORTGAGE CO., RESPONDENT, v. J. H. AND
W. R. HUTCHINSON, APPELLANTS.

JURY TRIAL—WAIVER OF—POWER OF THE COURT.—A circuit court has no authority to try an action at law involving an issue of fact without a jury, unless a jury trial is waived in the manner provided in the Civil Code. If such court deem such a case a proper one to be determined upon the law, it must direct the jury to return a verdict in favor of the party which the court considers entitled to it under the proofs.

SECTION 3027, HILL'S CODE, CONSTRUED—BONA FIDE PURCHASER—WHO IS.—A subsequent purchaser against whom an unrecorded conveyance is void, under section 3027, Hill's Code, must be a purchaser in good faith and for a valuable consideration of "the same real property, or a portion thereof," included in the unrecorded conveyance; and must be a purchaser under a form of conveyance or other instrument, which purports to convey the property. Hence a purchaser under a mere quit-claim deed, which only purports to remise, release and quit-claim the right, title and interest of the grantor in and to the property, will not be regarded "a purchaser of the same real property or any part thereof."

CASE IN JUDGMENT.—Where F. was owner of a parcel of land which he conveyed to E., but E. having failed to pay for the land conveyed it back to F., who neglected for several years thereafter to record the deed, and in the meantime E. executed a deed of quit-claim to D., who took the deed without actual notice of the prior conveyance by E. to F., except such as might be presumed or inferred from the character of the

19	334
257	242

19	334
148	478

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deed or the condition of the deed record of the county, and D. thereafter executed a quit-claim deed to the land back to E., who then executed a like deed to the land to W., who finally executed a deed of warranty to it to C., and several quit-claim deeds were thereafter made to it by C. and his grantees, containing covenants of warranty against the grantors, and it was finally purchased by the respondent under a mortgage foreclosure against some of the intermediate claimants, the land during all the time remaining vacant and unoccupied; *held*, that the said deeds did not constitute the grantees therein purchasers of the same real property or any part thereof, conveyed by E. to F., within the meaning of said section of the Code. *Quære*, whether if E., when he executed the deed to D., had had possession and seisin of the land, and D. had taken possession thereof under the deed to him, it would have constituted him such subsequent purchaser under said section of the Code.

APPEAL from Union county: JAS. A. FEE, judge.

The respondent herein, a private corporation, commenced an action against the appellants to recover possession of certain real property situated in said Union county, alleging that they wrongfully withheld from said respondent the possession thereof.

The appellants denied the allegations contained in the complaint and alleged ownership of the property in themselves.

A reply was filed denying the allegations of new matter set up in the answer.

Thereupon the said parties entered into the following stipulation: It is hereby stipulated by and between the plaintiff and defendant in the above-entitled action, that the following is a complete and perfect abstract of all the conveyances to the land in controversy in this action, to wit: The east one-half of the southwest one-fourth of section 23, township 2 south, of range 39 east; and that said abstract may be received and read in evidence at the trial of said cause in lieu of the originals or certified copies:

"State of Oregon to E. J. Flanery. Grantor conveys by said deed, dated December 9, 1872; recorded October 3, 1873, book "B," page 247; consideration, \$100.

"E. J. Flanery to John E. Chrisman. Grantor conveyed by warranty deed, dated October 23, 1873; recorded October 23, 1873; book "B," pages 248 and 663; consideration, \$50.

"John E. Chrisman to T. H. Foster. Grantor conveyed by warranty deed subject to mortgage to the State, dated

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October 10, 1874; recorded June 10, 1876, book "B," page 664; consideration, \$20.

"T. H. Foster and wife to F. Elliot. Grantor conveyed this and 240 acres of other land, by deed of bargain and sale, dated April 24, 1876; recorded June 20, 1876, book "B," page 665; consideration, \$1,400.

"F. Elliot and wife to T. H. Foster. Grantor conveyed this and 240 acres of other land, by quit-claim and special warranty against grantors, or others claiming by, through or under them, dated December 31, 1877; recorded February 23, 1883, book "F," pages 666 and 698; consideration expressed, \$1. The true consideration is as follows: The grantor, F. Elliot, having failed to pay the consideration for the conveyance from T. H. Foster and wife to him, re-conveyed to Foster and wife for that consideration, to wit, \$1,400.

"T. H. Foster and wife to S. O. Swackhamer. Grantor conveyed deed of bargain and sale, dated May 2, 1881; recorded May 2, 1881, book "E," page 184; consideration, \$500. That subsequent to the execution and record of the last-named conveyance, and prior to the hereinafter described conveyance from T. H. Foster and wife to M. B. Baird, the said S. O. Swackhamer and wife re-conveyed the said land to said T. H. Foster by quit-claim deed, for the consideration of \$500, but that said deed was not placed on record.

"F. Elliot and wife to Van B. DeLashmutt. Grantors conveyed this and 240 acres of other land by quit-claim deed, dated June 16, 1881, and recorded June 20, 1881, book "E," page 247; consideration, \$800. The grantee took this conveyance without actual notice of the prior conveyance of F. Elliot and wife to T. H. Foster, except such as will be presumed or inferred from the character of the deed, or the condition of the deed record of Union county, Oregon.

"Van B. DeLashmutt and wife to F. Elliot. Grantor conveyed this and 240 acres of other land by quit-claim

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deed, dated August 10, 1881; recorded September 2, 1881, book "E," page 328; consideration, \$1.

"F. Elliot and wife to T. A. Wood. Grantor conveyed this and 240 acres of other land by quit-claim deed, dated August 21, 1881; recorded September 2, 1881, book —, page 329; consideration, \$500. Grantee took this conveyance without personal notice of the prior conveyance of this land by F. Elliot and wife to T. H. Foster, except such as will be presumed or inferred from the character of the deed, or the condition of the deed record of Union county, Oregon.

"T. A. Wood to Brazella Chapman. Grantor conveyed this and 240 acres of other land by quit-claim deed, dated November 3, 1881; recorded November 10, 1881, book "E," page 399; consideration, \$500.

"Brazella Chapman to T. A. Wood. Grantor conveyed this and 240 acres of other land by quit-claim deed, dated November 10, 1881; recorded September 7, 1882, book "F," page 307; consideration, \$500.

"T. A. Wood to J. H. Cavanaugh. Grantor conveyed this and 240 acres of other lands by warranty deed, dated September 19, 1882; recorded September 27, 1882, book "F," page 309; consideration, \$1,200.

"J. H. Cavanaugh to D. K. Smith. Grantor conveyed this and 240 acres of other lands by quit-claim deed, with special warranty against grantor, or any others claiming through or under him, dated March 5, 1883; recorded April 5, 1883; book "F," page 756; consideration, \$650.

"D. K. Smith to J. H. Cavanaugh. Grantor conveyed this and 240 acres of other lands by quit-claim deed, with special warranty against grantor, and all others claiming under or through him, subject to the mortgage of the American Mortgage Co. of Scotland, limited, dated April 27, 1883; recorded April 30, 1883, book "G," page 55; consideration, \$1.

"T. H. Foster and wife to M. B. Baird. Grantor conveyed by warranty deed, dated February 9, 1884; recorded February 22, 1884, book "G," page 606; consideration, \$800.

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"J. H. Cavanaugh to D. K. Smith. Grantor conveyed this and 80 acres of other lands by quit-claim deed, with special warranty against grantor, and all others claiming through or under him, dated May 1, 1884; recorded May 17, 1884, book "G," page 705; consideration, \$3,000.

"D. K. Smith to J. H. Raley. Grantor conveyed this and 240 acres of other lands by quit-claim deed, with special warranty against grantor, and all others claiming through or under him, dated December 26, 1884; recorded January 13, 1885, book "H," page 399; consideration, \$559.

"The American Mortgage Company of Scotland (limited), v. D. K. Smith, J. H. Raley, M. A. Raley, C. P. Huntington, Charles Miller, W. R. S. Foye, and Albert Gullatin. Foreclosure of mortgage and sale on execution thereunder, and purchased by this plaintiff at said sheriff's sale on the — day of —, 1885. Said foreclosure was had under mortgage held by this plaintiff against this D. K. Smith on said land and other lands, which was recorded in mortgage record, book — at page —, on the — day of —, 188—, the consideration being \$—; that said sheriff's sale was afterwards confirmed, and deed regularly issued to this plaintiff; that neither these defendants nor those through whom they claim were parties to said foreclosure.

"J. H. Hutchinson and W. R. Hutchinson v. Nelson Shoonover, administrator, and the widow and heirs of M. B. Baird, deceased. Foreclosure of mortgage and sale by the sheriff on execution thereunder, and purchase by these defendants at said sheriff's sale on the tenth day of April, 1888, and certificate of said purchase issued by said sheriff to them, and that said land has not been redeemed. Said foreclosure and sale were had under a mortgage in favor of these defendants and against M. B. Baird and wife, the consideration being the sum of \$1,200. This plaintiff was not a party to said foreclosure.

"It is further agreed that the recitals and memoranda following each conveyance in said abstract may be admitted in evidence as explanatory thereof. It is also

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agreed that said land was vacant and unoccupied during all the time covered by the conveyances mentioned in said abstract. This agreement shall not be held binding on either of the parties in any subsequent suit pertaining to this property."

The case was tried by a jury and the only evidence adduced at the trial was the stipulation above set out; and verdict was rendered for defendant, which was afterwards, on motion of plaintiff, set aside and a new trial granted. A second trial was had before a jury and the same evidence and no other offered; and after instructions by the court, the jury again rendered verdict for the defendants. Plaintiff again moved the court to set aside the verdict and for judgment upon the stipulation, which motion the court granted, and then gave judgment for plaintiff for possession of the land in question, plaintiff having waived all claim for damages, which is the judgment appealed from.

J. W. Shelton, for Appellants.

If the stipulation showed on its face that the respondent was entitled to recover in the action, still the trial court had no power beyond the setting aside of the verdict and the granting of a new trial

It is a settled law of this State that a grantee in a quit-claim deed acquires no title to the land sought to be conveyed if his grantor had none which he could lawfully convey. *Baker v. Woodward*, 12 Or. 3; *Richards v. Snyder and Crews*, 11 Or. 501, 511; *Swift v. Mulkey*, 14 Or. 59, 64; *Guest v. Packwood*, 34 Fed. Rep. 368, 372; *Hastings v. Nissons*, 31 Fed. Rep. 597. To the decisions of our own State may be added *Villa v. Rodriguez*, 12 Wall. 323, 338; *May v. LeClaire*, 11 Wall. 217, 232; *Rothschild v. Boelter*, 18 Minn. 365; *Hutchins v. Com'rs of Carver Co.*, 16 *id.* 14; *Brown v. Jackson*, 3 Wheaton, 449, 451; *Baker v. Humphrey*, 101 U.S. 494, 499; *Dickerson v. Colgrove*, 100 U.S. 578, 584; *Postel v. Palmer*, 71 Iowa, 157; *Watson v. Phelps*, 40 *id.* 482; *Mann v. Best*, 62 Mo. 491; *Kearney v. Vaughan*, 50 *id.* 284.

R. Eakin, for Respondent.

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A quit-claim deed first recorded will convey a fee simple title to the grantee therein as against a prior unrecorded deed. *Fox v. Hall*, 74 Mo. 315; *Pettingill v. Devin*, 35 Iowa, 344; *Fash v. Blake*, 38 Ill. 363; *Brown et al. v. Banner C. & C. O. Co.*, 97 Ill. 214; *Rowe v. Beckett*, 30 Ind. 154; *Manafield v. Dyer*, 131 Mass. 200; *Chapman v. Sims*, 53 Miss. 154; *Pom. Eq. Jr.*, §§ 758, 759 and 760.

Baker v. Woodward, 12 Or. 8, only applies to the effect of a quit-claim deed as against an outstanding equity, hence the statement in the opinion in that case that "the grantor can, by such kind of deed, convey the residuum of the estate he has, and no more," has reference to the legal effect of the deed standing alone, and does not determine its effect under the recording act. *Allison v. Thomas*, 72 Cal. 562; *Graff v. Middleton*, 43 Cal. 340; *Frey v. Clifford*, 44 Cal. 343; *McConnel v. Reed*, 4 Scam. 117; 38 Am. Dec. 124; *Brown v. Jackson*, 3 Wheat. 448; *Richardson et al. v. Levi et al.*, 67 Tex. 359; *Hamilton v. Doolittle et al.*, 37 Ill. 482. A quit-claim deed as part of a chain of title is sufficient. 36 Fed. Rep. 478; *Snowden v. Tyler*, 21 Neb. 199; *Raymond v. Morrison*, 59 Iowa, 371; *Bryant v. Buckner*, 2 S. W. Rep. 452.

THAYER, C. J., delivered the opinion of the court.

The circuit court erred in trying the case after having set aside the verdict of the jury. It has no authority to try any action at law unless a jury trial is waived in the manner provided in the Civil Code. If the court had deemed it its duty to determine the case in favor of the respondent upon the law, it should have directed a verdict in favor of the respondent at the trial. As the case stands this court has no alternative but to reverse the judgment and remand the cause for a new trial. This is sufficient to dispose of the case so far as this court is concerned; but as it must go back for a new trial, it becomes our duty to declare the law applicable to the matters involved. The question presented is whether a conveyance of real property, not recorded as provided in title I of chapter XXI,

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Ann. Code, is void as against a subsequent purchaser of the same property whose conveyance is first recorded, where the purchase is by quit-claim deed and there is no evidence, aside from the record, showing the subsequent purchaser to have been a purchaser in good faith and for a valuable consideration, and whether the execution of a mere quit-claim deed to real property by a grantor who had previously conveyed it by deed to another grantee, but which deed was not recorded at the time of the execution of the quit-claim deed, constitutes a conveyance of "the same real property."

Counsel for respondent virtually concedes that a purchaser under a quit-claim deed takes subject to outstanding equities in the property existing at the time of the purchase whether the purchaser had knowledge of them or not; but he contends that such a deed, under the recording act, stands upon the same footing as other forms of conveyance, and, if first recorded, is as effectual to annul a prior unrecorded deed to the same property.

The question has given rise to much deliberation on the part of courts, and earnest discussion among law writers, though it is generally conceded that a grantee in a mere quit-claim deed acquires no right against outstanding equities which were valid against his grantor. *Postel v. Palmer*, 71 Iowa, 157; *Martin v. Morris*, 62 Wis. 418. Such also is the doctrine of the supreme court of the United States and of the courts of this State, as will be seen by a reference to the authorities cited in the appellants' brief herein; but it is claimed by many that such a deed effectually destroys the right of a grantee under a prior deed not recorded as required by the registry act, although it would not affect a prior equity in his favor which was binding upon the grantor. This, to my mind, is a somewhat strange view. Why the rights of the grantee under the prior deed should be cut off when a charge upon the property created in his favor by the grantor would not be, seems remarkable. It may be said that the prior grantee had the right to, and should have put his deed upon record; but it may, with as

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much reason, he said that he should have had the charge upon the property put in a form that would have entitled it to be recorded, and had it so done. The claim, it seems to me, amounts to this: If the owner of real property were to create a trust against it, in favor of another, and then execute a quit-claim deed to the property to a third person, it would not affect the trust, although the grantee in the quit-claim deed had no knowledge of it; but if he had executed a deed outright to the *cestui que trust*, and then quit-claimed his interest in the property to a third person, and the prior deed not have been recorded, the rights of the grantee in the prior deed would be lost. According to that kind of logic the grantee in the prior deed would have a better standing in such a case if his deed were not witnessed or acknowledged so as to entitle it to be recorded; as he would then clearly have an outstanding equity which would be shielded from the effects of the quit-claim deed. The form of the deed under which the respondent claims title herein is not set out in the stipulation further than it is stated to be a quit-claim deed. We must, therefore, infer that it is a remise, release and quit-claim of the right, title and interest of the grantor in and to the property in suit. It did not purport to convey the property to the grantee, it only conveyed to him such right as the grantor might have therein; and it would be difficult to perceive how the former could have expected to acquire any right in the premises unless the latter might own an interest in them. The terms of the deed were satisfied whether the grantor was owner of the property in fee or had no estate whatever in it. The grantee bargained for no quantity or quality of estate; he bought whatever the grantor might have, be the same more or less; and I do not see what *legerdemain* could be resorted to which would vest him with an interest that the grantor had previously divested himself of, and was then owned by a third party.

Purchasers of real property should be left free to make their own bargains, and the courts have no right to undertake to give them something which they did not buy and

the vendor did not own. The office of a quit-claim deed is well understood, and although it is as effective, under modern legislation, to convey all the estate which can be transferred by a deed of bargain and sale, yet it shows upon its face that the grantee therein only contracts for such title to the property as the grantor has. Such a deed under section 3004, Ann. Code of Oregon, is sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale; but a material difference is still recognized between the two forms of conveyance. A grantor, under the former conveyance, only intends ordinarily to convey such right to, or interest in, the property as he may have, and the grantee does not expect to acquire anything beyond that; while under the latter, the parties usually intend and expect a transfer of the property itself. It would be absurd for a grantor under a mere quit-claim deed to undertake to claim that he took title to the property freed from the previous acts of the grantor affecting that title. There is nothing in the nature of that character of conveyance which assures the grantee indemnity from such acts. He has no reason to believe that he has purchased a clear title to the property or anything more than what the terms of his deed indicate. He does not undertake to purchase what his grantor has already sold and conveyed to another, whether the deed of conveyance is registered or unregistered, but he purchases what the grantor has remaining, if anything. This view, I think, is sustained by a majority of the cases cited by respondent's counsel herein, and I believe that it is by the weight of authority generally. In the earlier case,—*Brown v. Jackson*, 3 Wheat. 450,—which is cited by said counsel, such a deed was held by the supreme court of the United States not to affect a prior unrecorded deed where its language showed that it was only intended to operate upon the right, title and interest which the grantor had at the time of its execution. What else a strictly quit-claim deed could operate upon I am not able to discover. In *McConnell v. Read*, 38 Am. Dec. 124, an early Illinois case, cited

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by said counsel, the language of the court is well calculated to be misleading as regards the nature and character of a quit-claim deed. At pages 126, 127, the court says: "A deed of release and quit-claim is as effectual for the purpose of transferring title to land as a deed of bargain and sale; and the prior recording of such a deed will give it a preference over one previously executed, but which was subsequently recorded. In this respect there is no distinction between different forms of conveyance. As a general rule the one first recorded must prevail over one of older execution, when made in good faith, and when it appears to have been the intention of the parties to convey again the same lands which had been previously conveyed. But where the terms of the second deed do not necessarily embrace the lands previously conveyed, but, on the contrary, are such as to show that it was not the intention of the grantor to include them, the court will give it such construction as not to embrace them, and will not allow it to operate to the prejudice of the purchaser." In that case one Arnett was owner of 80 acres of land, and on the twenty-first day of March, 1835, executed to the plaintiff a deed of release thereof, which was recorded on the same day; and on the first day of July, 1837, also executed to plaintiff a deed of bargain and sale for the same land, confirming and explaining the former deed of release. The defendant gave in evidence a deed from Arnett to one Rixford, dated May 12, 1827, and recorded October 1, 1836; and also several other deeds, constituting a connected chain of title to the said land from Rixford to himself. The court held that the deed of release from Arnett to the plaintiff, if unexplained, would transfer the land, the title to which the grantor had not previously divested himself by a valid transfer duly recorded. But that the plaintiff had furnished such evidence of the intention of the grantor by introducing the deed of bargain and sale from Arnett to himself as forbade such an interpretation of the conveyance, and sustained the defendant's prior deed, concluding from the extraneous evidence that it might be fairly inferred that

Arnett only intended by the quit-claim deed to transfer all right, title and interest therein which he then had. According to this decision, the plaintiff would have been secure in his title to the land under his deed of release if he had been content with it; but in order to make assurance doubly sure, he, two years thereafter, unfortunately obtained the second deed, which enabled the court to ascertain what the grantor's intention was in the first one, and this resulted in his losing the property.

I think the case was correctly decided, but do not agree with the views expressed in the opinion announced by the learned court. In my opinion the court was in error in holding that the prior recording of a deed of release and quit-claim would give it a preference over one previously executed, but which was subsequently recorded; also in its holding that the words, "remit, release and forever quit-claim all right, title and interest to all and every part, etc., unexplained would transfer the tract of land designated, of the title to which the grantor had not previously divested himself, by a valid transfer duly recorded." Nor do I admit that if said words unexplained would have had the effect to transfer such title to the said grantee, that they could be so explained as to convey an opposite meaning, by showing that the grantor at a subsequent time executed to him a second deed declaring what his intention and design were in making the first one; or that words in a deed, having a fixed and settled meaning, can be explained in that way to mean something different from what they purport to in the instrument, and which the law attaches to them. If such rule were to obtain, the tenure by which real property is held would be very insecure. The latter case and others following it seem to have gotten the Illinois courts into a line of error as to the effect of a quit-claim deed, which has become chronic, and from which they are unable to extricate themselves. In *Brown et al. v. The Banner Coal & Oil Company*, 97 Ill. 214,¹ in which case the question arose, the supreme court of that State seemed to realize its helpless condition and inability to rid

(1) 85 Am. Rep. 105.

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itself of the unfortunate precedent which had been established. Chief Justice Dickey, in speaking for the court, says: "Counsel for appellants insist with much force that the grantee in such a quit-claim deed as that of Pollock, made in 1865"—a deed of all right, title, interest, claim or demand of the grantor in and to the property—"is not a subsequent purchaser in good faith of the same thing which was conveyed by his former deed to Brown. Were this is an open question before us, the suggestions presented in their argument would be entitled to very great consideration; but the question is settled in this State by a line of authorities, which constitute a rule of property and ought not to be disturbed by the courts." So the court, following the "line of authorities," held that as the deed did not contain words manifesting an intention not to include lands previously granted, or words suggestive of a former conveyance of the same land by the grantor, the grantee therein would be a purchaser thereof and protected by the registry act. It must, it seems to me, be humiliating to be compelled to make such a holding. The idea that the deed in question did not manifest an intention not to include lands previously granted, I can only regard as preposterous. Words may be, and often are, inserted in that form of deed which change its nature; but it then ceases to be a quit-claim deed and becomes in effect a deed of bargain and sale. The Texas courts seem to have had much experience with that class of cases. The supreme court of that State, in *Richardson et al. v. Levi et al.*, 67 Tex. 359, which is one of the cases cited by respondent's counsel, held, that a deed which purports to convey only the right, title and interest of the grantor, will not protect the grantee against prior unregistered instruments; but not so where the deed purports to convey more than such right, title or interest. In that case the granting clause in the deed was, "grant, bargain, sell, demise, release and forever quit-claim unto the said ———, his heirs and assigns, the following lots of land, etc., and the court held that the

grantee therein had his election in what way to take, and might take what either of these words would convey; that he was not restricted by the fact that his estate under one of the words would be of less value than under another; that he might therefore escape being charged with notice under the "quit-claim" by electing to take under the "grant, bargain and sale."

There is a class of cases which hold that a grantee under a quit claim deed will acquire a good title as against a prior grantee of the land from the same grantor where the prior conveyance is not recorded as required by the registry act, and the grantee under the quit-claim deed is shown to be a purchaser in good faith and for a valuable consideration. *Fox v. Hall*, 74 Mo. 315; *Graff et al. v. Middleton et al.*, 43 Cal. 341, and *Frey v. Clifford*, 44 Cal. 335, belong to that class, and would seem to support the view of respondent's counsel. But the decisions in the two California cases appear to be questioned by Temple J., in *Allison v. Thomas*, 72 Cal. 562. The learned judge in delivering the opinion of the court, after remarking that a purchaser of the right, title and interest of a judgment debtor took subject to all equities and secret defects, at page 564 of the case, says: "We do not overlook the case of *Graff v. Middleton*, in which it was held that under the twenty-sixth section of the recording act, then in force, a quit-claim deed received in good faith and for a valuable consideration would prevail over a prior unrecorded deed. That decision is made to turn upon the language of that statute defining the word conveyance. This ruling was followed in *Frey v. Clifford*, 44 Cal. 343, where the description of the estate conveyed was 'all my right, title and interest' of the grantor. Unless these cases are justified by the peculiar wording of the statute, they seem to be against the decisions elsewhere upon the subject. It has been uniformly held that a conveyance of the right, title and interest of the grantor vests in the purchaser only what the grantor himself could claim, and that the covenants in such deed, if there were any, were

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limited to the estate described." Citing in support of the view a number of authorities.

I have no particular fault, however, to find with the doctrine that a grantee under a quit-claim deed acquires a good title to the property as against a prior grantee thereof under the circumstances above mentioned. Where the grantor in such a case is in possession of the property, and executes the deed for a valuable and adequate consideration to the grantee who takes possession of it under the deed, I think it would be a wholesome and just rule to hold that his title to the property was superior to that of the grantee under the prior unrecorded conveyance, or to any outstanding equity against the property of which he had no notice. But whether he would be able to assert such superiority of title, under the strict rules of law, I express no opinion as it is unnecessary to do so under the circumstances of this case. I do, however, maintain that a grantee under a mere quit-claim deed reciting a nominal consideration, where no possession of the property is given under the deed, acquires no right to it as against a prior grantee, whether the deed of such grantee be recorded or not.

The view which I entertain upon this subject is well expressed in the concluding part of an article by Charles C. Marshall, published in vol. 23, page 244, of the Albany Law Journal, which is as follows: "It will be seen from this review of the authorities that the force and effect of a deed of quit-claim is a matter not requiring adjudications by the courts. Its force is certainly dependent not upon its distinguishing words, but upon the intention of the parties as expressed in the deed. It may, in the absence of possession by the grantee or releasee, be void, as stated in *Branham v. Mayor*, and *Bennett v. Irwin*, *supra*; or if an intention to convey be recited, as in *Lynch v. Livingstone*, *supra*, it may have the force and effect of a deed of bargain and sale. The intent seems to be the controlling element. And this may be expressed in curious ways,—by a formal recital, by the existence of some former estate in the

release, by words of grant other than 'remise, release and quit-claim.' Indeed, an adequate consideration or a covenant of warranty seems in some of the cases to imply an intent to convey the estate, as in the Massachusetts cases above referred to. But it is difficult to see wherein an intent can be implied in a naked quit-claim, by which we mean a quit-claim deed without covenants, and expressing only the nominal consideration of one dollar. As above intimated, it seems a matter of some doubt whether the protection of the recording acts could be extended under such a deed, for such a deed is perfectly consistent with the existence of a prior unrecorded deed to some third person. As it purports to release only such right as the releasor may have in the premises described, and as its nominal consideration of one dollar must in most cases be conspicuously inadequate, there seems sufficient to put the purchaser on his guard. If A., being actually vested with the fee to certain real estate, executes a quit-claim deed thereof to B., it is certain the fee would pass. The question is, is the record conclusive evidence of the existence of the fee in A.? If A. had conveyed the fee to C. by a prior unrecorded deed, what is to prevent C. from setting up his unrecorded deed when there is nothing on the record from A. save the quit-claim deed? The two deeds do not conflict. The quit-claim deed with its nominal consideration purports to convey only such rights as A. may actually have. It may be something or nothing. And the recording act, it is suggested, will not give to an instrument of record any greater force or larger meaning than that expressed by its words."

The same view, substantially, is also expressed by Watts, J., in delivering the opinion of the court in *Thorn v. Newsom*, 58 Am. R. 747; 64 Tex. 161, wherein he says: "While non-registered deeds are declared void by the statute as to subsequent purchasers for value and without notice, still the doctrine is well settled that a subsequent purchaser, although for value and without notice, who takes under strictly a quit-claim deed, that is, one by which

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the chance of title, and not the land itself, is not conveyed, will not be accorded the protection of the statute, for the obvious reason that he contracted for the interest only that his vendor then had in the land. If the vendor had previously divested himself of the title to a portion or all of the land, to the extent of the divesture, there would be no right remaining in the vendor to pass by the quit-claim to the vendee. It is the then interest of the vendor for which he contracts, and it is to such interest only that he is entitled under the quit-claim deed."

There are many other authorities bearing upon this question which might be noticed, but they are too numerous and extensive to attempt it. Several of them, notably *Chapman v. Sims*, 53 Miss. 154, and *Fox v. Hall*, 74 Mo. 315, support the position assumed herein by respondent's counsel. I think, however, that the weight of authority and reason is against it.

The circumstances under which the deeds, in the Elliot line of title herein, were executed are not shown in the stipulation of the parties upon which the case was tried. All that appears therefrom is that Elliot quit-claimed the land and 240 acres of other land to DeLashmutt in June, 1881, and DeLashmutt, in August, 1881, quit-claimed it back to Elliot; then Elliot quit-claimed it to Wood August 21, 1881, and Wood, in November, 1881, quit-claimed it to Chapman, who in the same month quit-claimed it back to Wood. After the parties had thus tossed about their pretended title to the property for more than a year, Wood, on the nineteenth day of September, 1882, executed the warranty deed to Cavanaugh, upon which the respondent's counsel predicates his point that "a quit-claim deed as a part of a chain of title is sufficient." This deed is the only deed which purports to convey the land, though the subsequent ones from Cavanaugh and his grantees contained covenants against the grantor. The facts in the case are not therefore like those in *Sherwood v. Moelle*, 36 Fed. Rep. 478. There the chain of title was made up of warranty deeds, with the exception of one quit-claim deed; while here it is

made up of quit-claim deeds, with the exception of one warranty deed. The facts in the two cases also differ in another particular. In *Sherwood v. Moelle* the testimony showed that the grantee in the quit-claim deed "acted in good faith, in ignorance of the outstanding title not apparent of record, and paid full value for the land"; while in this case there is no evidence upon those points except that the grantee DeLashmutt took the conveyance from Elliot without actual notice from Elliot and wife, except such as might be presumed or inferred from the character of the deed or condition of the county records. But the main difficulty in the respondent's case is that Wood had nothing in the premises to convey or that Cavanaugh could expect to receive; he had no possession of the land, either actual or constructive. Foster and his grantees were in the constructive possession of it under the deed from Elliot and wife to Foster. The deed to DeLashmutt and from him to Wood conveyed no interest in the land to either of them. Elliot had neither possession, right to possession nor right of property therein. If he had had seisin of the land his deed to DeLashmutt and the deed from DeLashmutt to Wood might have vested it in the latter and thereby have constituted a claim of title. And I am not able to understand from the said stipulation how said last-named parties under the said quit-claim deeds can be said to have been subsequent purchasers "of the same real property or any portion thereof," which was conveyed by Elliot back to Foster, within the meaning of section 3027, Ann. Code; and if their said transactions did not constitute them subsequent purchasers of the same property, then the conveyance to Foster was not affected thereby, and the deed to Cavanaugh did not entitle him and his grantees to the protection of said provision of the Code.

The judgment will be reversed and the cause remanded as before indicated.

Statement of facts.

[Filed June 10, 1890.]

STATE OF OREGON, RESPONDENT, v. D. STERRITT,
APPELLANT.

INDICTMENT—WHEN GUILTY KNOWLEDGE NEED NOT BE ALLEGED.—In an indictment under section 3352, Hill's Code, guilty knowledge need not be alleged. In declaring the acts mentioned in that section punishable, the legislature was exercising the police powers of the State, and in such case the indictment need not allege that the party knew the act complained of was unlawful.

DISEASED SHEEP—MOVING WITHOUT PERMIT—INDICTMENT.—An indictment under section 3352, Hill's Code, for moving diseased sheep, which fails to follow the descriptive words of the statute, by alleging the ownership of the sheep, is bad on demurrer.

APPEAL from Grant county: M. D. CLIFFORD, judge.

The grand jury of Grant county returned into court the following indictment against the appellant: "D. Sterritt is accused by the grand jury of Grant county and State of Oregon by this indictment of the crime of unlawfully moving sheep infected with scab from place to place without first having obtained a traveling permit therefor, committed as follows: The said D. Sterritt, on the first day of April, A. D. 1889, in the county of Grant and State of Oregon, having then and there a band of sheep of about 1,500 head, infected with scab, did unlawfully move said band of sheep over and across the range of one E. Mumford, a distance of about fifteen miles; he, the said D. Sterritt, then and there having no traveling permit to move said sheep, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Oregon."

This indictment is founded on section 3352, Hill's Code, which is as follows: "Any person, company, corporation, or association desiring to move his or their sheep, which are not sound, or are infected or affected with scab or any infectious or contagious disease, shall obtain from the inspector a traveling permit; but such permit shall only be granted for the purpose of moving said sheep to some place where they may be treated for said disease, and by such route as the inspector may designate."

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The defendant demurred to said indictment on the following grounds amongst others: "That said indictment does not show that the defendant knew that said sheep were infected with scab at the time of their alleged removal; that said indictment does not show that defendant was the owner of said sheep at the time of their alleged removal."

The demurrer was overruled; and the defendant having pleaded not guilty, upon a trial before a jury was convicted and sentenced to pay a fine, from which judgment this appeal is taken.

W. M. Ramsey, for Appellant.

J. L. Rand, district attorney, for the State.

STRAHAN, J., delivered the opinion of the court.

Upon the argument in this court the appellant mainly relied upon the objections taken by the demurrer to the indictment.

1. The first objection insisted upon was that the indictment failed to allege knowledge of the defendant that the sheep had the scab at the time of their removal. In a very large class of offenses, and mainly those that were classed as *mala in se* at common law, guilty knowledge is necessary to complete the offense and it must be alleged. But in that other class, wrongs which are forbidden by statute, and more especially those offences which are made punishable in furtherance of the public policy of the State, such as the exercise of the police powers, the collection of revenue and the like, are punishable whether the offender had guilty knowledge or not. This distinction was lately sustained in this court in *State v. Chastain*, *ante*, and is adhered to. The offense under consideration belongs to the latter classification, and is punishable whether the accused party knew the sheep were diseased or not. The doing the act under the circumstances defined in the statute is what is punishable, and when the pleader brings the offense within the descriptive words of the statute it is generally sufficient.

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2. The next objection is that the indictment does not show that the defendant was the owner of said sheep at the time of their alleged removal. This objection must be sustained. "Any person desiring * * * to move his * * * sheep," not the sheep of another, must obtain the permit. These words are a part of the statutory definition of the offense, and in such case the indictment should follow the language used in the statute and expressly charge the described offense on the defendant or it will be defective. It is necessary that the defendant should be brought within all the material words of the statute; and nothing can be taken by intendment. 1 Whart. Cr. Law, § 364.

It follows from this view of the law that the indictment is defective, and the judgment of conviction must be reversed, and the cause remanded to the court below with directions to sustain the demurrer to the indictment.

[Filed June 10, 1890.]

ERNEST HAASE, RESPONDENT, v. THE OREGON RAILWAY AND NAVIGATION CO., APPELLANT.

EVIDENCE—HEARSAY.—In an action against a railroad company to recover damages for personal injuries, it is not competent for the plaintiff to give in evidence the statements and declarations of a stranger in relation to the departure or movements of the defendant's trains. Such evidence is hearsay.

PASSENGER AND CARRIER.—A person who has purchased no ticket and paid no fare who goes to a caboose attached to a freight train, and, without the knowledge of those in charge of such train, attempts to get into said car at a place where the railroad company is not accustomed to receive passengers, is not a passenger; and if he is injured in such attempt to board the train, and those in charge of it have no knowledge of his presence, the company is not liable for the injury.

CONTRIBUTORY NEGLIGENCE.—A person who goes in the night-time in the midst of a car yard, and at a place where the railroad company is not accustomed to receive passengers, and without the knowledge of those in charge of a freight train standing there, attempts to enter the caboose attached to such freight train, and is injured, is guilty of contributory negligence and cannot recover for such injury.

APPEAL from Wasco county: J. H. BIRD, judge.

This is an action to recover damages for alleged negligence. It is charged in the complaint that the plaintiff desiring to go to Hood River, on the line of the railroad

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owned and operated by the defendant between The Dalles and Portland, applied at the office of the company at The Dalles for the purpose of purchasing a ticket to Hood River and to gain information as to when a train would leave for said station; that the office was closed, and that thereupon a man whose name the plaintiff does not know, but whom the plaintiff believes to be an agent of the defendant, directed the plaintiff to defendant's train at said Dalles City; that thereupon the plaintiff proceeded to a train which was standing still, and was in the act of stepping on one of the cars of the train while the same was standing still at the defendant's depot, a usual place of stopping, when, without warning to the plaintiff or any signal, the train suddenly and rapidly backed up; that by reason of said negligent and careless acts of the defendant, the plaintiff was thrown from the platform of said car to the ground with great force and was thrown under the wheels of the car, which ran upon and over the plaintiff, crushing his left foot below the knee, necessitating the amputation thereof. The plaintiff lays his damages at \$50,000.

The answer denies each material allegation of the complaint and then alleges contributory negligence on the part of the plaintiff as the proximate cause of the injury, which was denied by the reply. The plaintiff had a verdict and judgment for \$3,500, from which this appeal is taken.

Zera Snow, for Appellant.

A. S. Bennett and *J. L. Story*, for Respondent.

STRAHAN, J., delivered the opinion of the court.

During the trial numerous exceptions were taken by the appellant, a few only of which it will be necessary to notice. At the conclusion of the evidence on the part of the plaintiff, the defendant moved for a non-suit, which was overruled and an exception taken. Ernest Haase, the plaintiff, testified in his own behalf, in substance: That he had been living at Trout Lake, in Washington Territory,

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for about five months; his occupation was that of a blacksmith and farmer; had been employed by Bogurt and Sukesdorf, and just before the accident had been in the employ of Borthwick and Frame at a saw-mill in Washington Territory; had worked there two or three days; he came over from Washington Territory on the day preceding the night of the injury with a barge load of ties, which, being unloaded, in the course of which he had torn his clothes, he concluded to go to Hood River to get some clothes which had been left there by him, having in the meantime bought a new suit; that he went to the Umatilla House at Dalles City to buy a ticket, but the office was closed; this was about half past seven in the evening; he was told that no passenger train went out that night, nor before half past three the following morning, but that a freight train would be going out that evening about half past ten and that it would start from the freight depot. It did not appear by whom this information was given to the plaintiff, and the same was objected to by the defendant, which objections were overruled and an exception taken. This exception will be noticed in connection with some others presenting substantially the same principle. The plaintiff further testified that some man went with him from the Umatilla House toward Umatilla Junction, up the river, where there were several tracks and some cars standing, but he could not tell what kind of buildings he saw; that he went a couple of hundred meters up the direction spoken of to where the cars were, and to the place where the man showed him. That part of this evidence which relates to the place pointed out to the plaintiff by this unknown man was admitted over the defendant's objection and it was also excepted to. The witness further testified: There was one car there and a full train to which was attached an engine; smoke was coming out from the engine; that he undertook to get on the train; he stepped with his right foot on the steps, when the train gave a lurch, throwing him off under the cars; immediately it went forward and ran over his left

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foot and the heel of his right; that the train was not in motion when he first saw it, but almost immediately upon putting his foot upon the steps to get on to the car, the train gave a sudden lurch backwards, and it went about a car's length; does not know whether he was holding on to the iron when trying to board the car or not; that the backward motion threw him off his balance; that the train having backed about a car's length, started forward, and the forward motion threw him under the car, and his foot was crushed; the train pulled out, leaving him lying on the ground, and three or four minutes after he fainted away, and has no recollection of when his foot was amputated, but he was conscious for three or four minutes after the amputation, and there were some people around him before he fainted, among them some one who spoke German, but he does not know who they were; that it was ten or half past ten when he undertook to get on this car; that he intended to get on the train to go to Hood River to get his clothes; that he intended to pay his fare; that the car he attempted to get on was a caboose car; that he heard no bell rung or whistle blown before the train started; that after he was run over the train went on to Hood River.

On his cross-examination the witness testified: That it was half past seven or eight when he went to the Umatilla House to get the ticket; that he was alone; that he stayed there about five minutes, and from there went to take a walk through the town; he was alone; he went from the Umatilla House along the track and turned to the right, where there was a butcher-shop; stayed there a quarter of an hour or a little longer; he knew no one there; went back down the railroad track and down the street; he met somebody and went back again with this person; does not know the place to which he went, but had some port wine; the place was two or three streets from where the butcher-shop stands, on the street leading to the brewery; the name of the man with whom he drank was Keller; he stayed in the saloon about ten minutes; that no one was there but

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the bar keeper. He went on back to the Umatilla House, parting with Keller on the street, and from there he went to the train, going up the street upon which the railroad is on; he did not stop on his way back to the Umatilla House, but came on down the railroad, walked over to the end of the Umatilla House and then returned to take the train, going up the street the railroad was on; that he first met Keller before going to drink with him on the street the railroad track is on; that he had never seen him before; that he was talking German with some one at the time, and he, the witness, took part in the conversation; that he had drank some beer in the early part of the evening at the Wolf Gang saloon, just before going to the Umatilla House the first time, a short time before half past seven; he and three others drank a quart of beer, which was all the liquor he had drank; this was not at the same saloon at which he drank with Keller; from the time he left the Umatilla House to the time of his return, after he had taken his walk and had his wine with Keller it was probably half an hour; that he almost went immediately back from the Umatilla House to the train, taking the sidewalk a part of the way and the wagon road the other; going up he did not see any locomotive; that they first went up on the right-hand side of the track, crossed over some railroad tracks and went the remainder of the distance on the river side of the track, from which point he undertook to get on to the caboose; that there was an engine on one side of him, to his right-hand; there was another car standing between him and the caboose which he attempted to get on, around which he had to go; the caboose which he attempted to get on was about twenty car lengths from the engine; that he attempted to get on the front of the caboose; the caboose was at the rear end of the train, and was attached to the train when he attempted to board it; does not recollect whether he had hold of anything with either hand when attempting to get on or not, the train went so quickly, but it moved back the first time from one-half to a car's length and then moved forward and the train left; the

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movement backward was a quick jerk, and all at once it started ahead and went on and he saw no more of it; it moved forward and he was thrown under the car; that when the backward movement of the train threw him off his balance, he made an effort to catch hold of something, clutched at the bars and slid off; the forward movement of the car after it had backed some distance was quick, and before he knew anything he was hurt; that the only time that he drank with Keller that evening was the wine he took; no one was present, except the bar keeper, Keller and himself; was quite sure he did not take beer; does not know how long after he was hurt till he was picked up; he cried out and somebody spoke German to him; that was before he fainted and after he was hurt; the next thing he remembered was when the doctor tried to call him after his leg had been taken off; it was the following morning; that the man who spoke German to him asked him what was the matter, and told him the doctor would be there pretty soon; when he undertook to get on the caboose he did not see any other trains in the yard. Witness further testified: He has no recollection of the bar keeper refusing to give him any more drink because he was drunk, when at the bar with Keller, or any recollection of anything of the kind having occurred; that the last time he left the Umatilla House to go to the train he was in company with some other person, he does not know whom, and that they parted at the train, this person leaving while he, the witness, was performing a call of nature; that he did not stop in on the way up from the Umatilla House, but walked leisurely on; he is sure the office was closed at half past seven when he went to buy a ticket, and that from that time to the time when he attempted to board the train about three hours only had elapsed.

Other evidence tends to show that the defendant company had been in the habit of carrying passengers on freight trains and charging fare therefor, and that they had been in the habit of taking such passengers aboard the train at the freight depot, which is four or five blocks

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east of Umatilla House; that there was a building there and more than one railroad track; that the distance from the Umatilla House is about fifteen hundred feet; only knows who was operating the road by information; that if a person wanted to ride he had to go to the freight house and get on to the caboose.

The plaintiff also introduced evidence tending to prove that after the injury he was found lying between two tracks in the freight yard, which is along side of the freight depot from twenty to thirty feet from it and to the north; that there were three side tracks between the freight depot platform and where the plaintiff was lying. This is the substance of all the evidence on the part of the plaintiff.

1. The first question to which our attention will be directed is the appellant's exception to that part of the plaintiff's evidence in relation to what was told him at the Umatilla House and what the unknown man said to him in relation to the movements of the defendant's trains, etc. The purpose of this evidence is not very apparent, but by it, I think, the plaintiff sought to place before the jury the information upon which he acted in relation to the defendant's trains and to account for his going to the yard where he was hurt at the late hour of the night when the accident occurred. It is difficult to see how the unauthorized acts or words of a stranger, who is not shown to have any connection whatever with the defendant company, could affect or bind it; and yet it is perfectly obvious from the whole tenor of this evidence that such was its purpose. What effect the jury permitted it to have upon their deliberations we cannot know, but there can be no doubt it was prejudicial to the defendant. The plaintiff was charged with contributory negligence, and one effect of this evidence was, to some extent, to account for his presence in the defendant's car yard at an unusual hour of the night and under circumstances more or less dangerous, and it may be to relieve him from blame in being there under the circumstances detailed by the plaintiff; but in no view

that has been presented to the court was the evidence competent.

2. But the defendant's motion for a non-suit presents a still more serious question, and imposes the delicate duty upon the court of passing on the plaintiff's evidence and determining whether or not it tended to prove a case sufficient to be submitted to the jury. The defendant, if liable at all, is liable on the ground of negligence; that is, it must have violated some duty which it owed to the plaintiff, and the plaintiff must have been free from any fault which contributed to the injury of which he complains. Looking at the plaintiff's complaint alone, and it is difficult to say that it contains a charge of negligence. It is clear that it contains no direct charge of that kind. The fact that the plaintiff proceeded to a train which was standing still and was in the act of stepping on one of the cars of the train while the same was standing still at the defendant's depot, a usual place of stopping, when, without warning to the plaintiff or any signal, the train suddenly and rapidly backed up, does not seem to me to be enough. It is true the plaintiff desired to go as a passenger to Hood River, and went to the car for that purpose, but it does not anywhere appear that the car was at the place where the evidence shows the defendant was accustomed to receive passengers on the freight trains.

But waiving the question of pleading altogether, is the evidence sufficient? The defendant being a common carrier was bound to receive all persons as passengers who wished to travel on its trains and who complied with its regulations in relation to fare; but it was not bound to receive passengers otherwise than at stations or places provided for that purpose. If it was in the habit of receiving passengers at its freight depot at The Dalles, then, whenever one of its trains which carried passengers was drawn up at that place and ready to depart for any point on the road, it was bound to receive and transport to their destination all persons offering themselves as passengers who had tickets or were ready to pay the fare, and in the performance of

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that the defendant company was bound to exercise the greatest degree of care; but it was not bound to receive passengers away from the usual place set apart for that purpose in that particular class of cars or in the midst of the place used for making up trains, nor is a person who goes and climbs upon a freight train in the midst of such yard without notice to the company, at a place where the defendant company was not accustomed to receive passengers in any sense a passenger. This train was not at the freight depot where the plaintiff proved the company received passengers. On the contrary, the plaintiff's evidence shows that there were three side tracks between where the plaintiff was found lying after the injury and the freight depot. I do not think that giving the fullest effect to all the evidence on the part of the plaintiff, and assuming every fact and inference that might or could be properly drawn from the evidence, it establishes or tends to establish that the relation of passenger and carrier was created between the plaintiff and the defendant. The fact that the plaintiff in any way made known to the defendant his wish to become a passenger on that or any train; he did not go to the place where the company was accustomed to receive passengers, but climbed upon one of its freight cars in the midst of the yard. The company, having no knowledge of his presence, moved its train in such a way that he was injured; but how can it be said that there was any negligence? Under these circumstances I think it can be said that it owed him any duty, and, being under no duty, it could not take the precautions necessary to prevent injury which it would otherwise have been bound to take. But this is not all. The plaintiff did not go to the place when he went into the defendant's car until at the hour of ten o'clock at night or later, and, without the knowledge of any of the employes of the defendant, intended to board one of its freight cars for the purpose of going upon a journey. And it must not be overlooked that where the plaintiff undertook to board the train was not at the freight depot where the defendant was accus-

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tomed to receive passengers in the caboose of the freight train, but in the midst of the yard, with three side tracks between the depot and the place where the injury occurred. Such a course of conduct by the plaintiff was dangerous. The plaintiff thus put himself in a place of peril which it was his duty to avoid; and if, by reason of such conduct, he was injured, the law will preclude a recovery on the ground of contributory negligence. The law will not permit an individual to voluntarily and knowingly place himself in a place of danger or to be guilty of conduct which is dangerous in itself and which causes an injury, and then permit such party to throw the responsibility for such injury upon another, although such other may not have been without fault.

These considerations necessarily lead to a reversal of the judgment, and render it necessary to remand the cause with directions to the court below to allow the defendant's motion for a non-suit.

[Filed June 10, 1890.]

O. C. GOVE & CO., APPELLANTS, v. THE ISLAND CITY
MERCANTILE AND MILLING CO., RESPONDENT.

19	363
190	289
19	363
44	576

CONTRACT TO REPAIR MILL AND FURNISH MATERIAL—QUANTUM MERUIT.—When one performs services for another on a special contract, and, for any reason except a voluntary abandonment, fails to fully comply with his contract, and the service and material have been of value to him for whom they were rendered and furnished, he may recover for such material and services their reasonable value, after deducting therefrom any damages the party for whom such materials were furnished and services were rendered has sustained by reason of such failure. *Seepley v. Newton*, 7 Or. 110; *Tribone v. Stroubridge*, *ibid*, 156, and *Todd v. Huntington*, 18 Or. 9, approved and followed.

APPEAL from Union county: JAS. A. FEE, judge.

The material portion of the complaint is as follows:
“That heretofore, to wit, between the first day of May, 1886, and the first day of January, 1887, at Union county, State of Oregon, the plaintiffs, at the special instance and request of the defendant, and for its use and benefit, furnished a large amount of material and machinery

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that duty the defendant company was bound to exercise the greatest degree of care; but it was not bound to receive passengers away from the usual place set apart for that purpose on that particular class of cars or in the midst of its yards used for making up trains, nor is a person who goes and climbs upon a freight train in the midst of such yard, without notice to the company, at a place where the defendant company was not accustomed to receive passengers, in any sense a passenger. This train was not at the freight depot where the plaintiff proved the company received passengers. On the contrary, the plaintiff's evidence shows that there were three side tracks between where the plaintiff was found lying after the injury and the freight depot. I do not think that giving the fullest effect to all the evidence on the part of the plaintiff, and conceding every fact and inference that might or could be properly drawn from the evidence, it establishes or tends to establish that the relation of passenger and carrier was created between the plaintiff and the defendant. The plaintiff had not in any way made known to the defendant his wish to become a passenger on that or any train; he had paid no fare; he did not go to the place where the company was accustomed to receive passengers, but climbed upon one of its freight cars in the midst of the yard. The company, having no knowledge of his presence, moved its train in such a way that he was injured; but how can it be said that it was guilty of negligence? Under these circumstances I fail to see that it owed him any duty, and, being ignorant of his presence, it could not take the precautions to protect him from injury which it would otherwise have been its duty to do. But this is not all. The plaintiff did not use due care when he went into the defendant's car yard at the hour of ten o'clock at night or later, and, without the knowledge of any of the employes of the defendant, undertook to board one of its freight cars for the purpose of going upon a journey. And it must not be overlooked that where the plaintiff undertook to board the train was not at the freight depot where the defendant was accus-

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tomed to receive passengers in the caboose of the freight train, but in the midst of the yard, with three side tracks between the depot and the place where the injury occurred. Such a course of conduct by the plaintiff was dangerous. The plaintiff thus put himself in a place of peril which it was his duty to avoid; and if, by reason of such conduct, he was injured, the law will preclude a recovery on the ground of contributory negligence. The law will not permit an individual to voluntarily and knowingly place himself in a place of danger or to be guilty of conduct which is dangerous in itself and which causes an injury, and then permit such party to throw the responsibility for such injury upon another, although such other may not have been without fault.

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[Filed June 10, 1890.]

O. C. GOVE & CO., APPELLANTS, v. THE ISLAND CITY
MERCANTILE AND MILLING CO., RESPONDENT.

19	363
1890	280
19	363
44	576

CONTRACT TO REPAIR MILL AND FURNISH MATERIAL—QUANTUM MERUIT.—When one performs services for another on a special contract, and, for any reason except a voluntary abandonment, fails to fully comply with his contract, and the service and material have been of value to him for whom they were rendered and furnished, he may recover for such material and services their reasonable value, after deducting therefrom any damages the party for whom such materials were furnished and services were rendered has sustained by reason of such failure. *Eleples v. Newton*, 7 Or. 110; *Tribone v. Stroubridge*, *ibid.*, 156, and *Todd v. Huntington*, 18 Or. 9, approved and followed.

APPEAL from Union county: JAS. A. FEE, judge.

The material portion of the complaint is as follows:
“That heretofore, to wit, between the first day of May, 1886, and the first day of January, 1887, at Union county, State of Oregon, the plaintiffs, at the special instance and request of the defendant, and for its use and benefit, furnished a large amount of material and machinery

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in, about and for the rebuilding, construction and repair of a certain flouring mill of the defendant, and, at its special instance and request, between said dates, did and performed a large amount of work and labor for the defendant in the rebuilding, construction and repair of said mill and its attachments. That said material and machinery, furnished to the defendant as aforesaid, and said work and labor done and performed for the defendant by the plaintiffs as aforesaid, were and are reasonably worth the full sum of \$8,134.25; that said sum of \$8,134.25 long since became and is now due and payable, and that no part of said sum except the sum of \$5,631 has been paid thereon. That said sum of \$8,134.25 became due and payable prior to January 1, 1887, and that there is now due and unpaid for said work, labor, material and machinery, after deducting said partial payment, the sum of \$2,503.15, with interest, etc., and the same has been demanded," etc.

The answer, after denying the plaintiffs' allegations, avers that said labor was performed and material and machinery furnished under a written contract, which is set forth in the answer. The answer further avers that the plaintiffs did not perform or comply with the conditions of said contract on their part, in "that the millwright work performed by the plaintiffs upon said mill was not done in a thoroughly workmanlike or substantial manner, but that it was done in an unworkmanlike and unsubstantial manner; that the material and machinery furnished by the plaintiffs were not first-class of their kind or suitable for the purposes used, but that they were indifferent in quality and not at all adapted to the purposes expressed in said contract; that the plaintiff did not demonstrate that said mill when constructed by them had a capacity of sixty barrels of flour in twenty-four hours' time, or that it was capable of making as good flour or as much flour per bushel of wheat as any mill in Eastern Oregon when grinding the same kind of wheat; and that, in fact, said mill when abandoned by plaintiffs, did not

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have a capacity of sixty barrels of flour in twenty-four hours' time or any greater capacity than forty-five barrels in said time; and that it was not capable of making as much flour per bushel of wheat or of as good quality as other mills in Eastern Oregon when grinding the same kind of wheat." The answer alleges, also, that the mill was not completed ready to run until September 20, 1886. The answer denies that the material, machinery, and labor were worth more than \$5,200, and denies that the defendant accepted the mill, etc.

The reply admits the execution of the written agreement pleaded in the answer, and alleges that the plaintiffs "fully complied with the conditions of said contract, set up in said answer, on their part, excepting that a small portion of the machinery furnished under said contract was not in every respect what it should have been, and that the defects therein were not discovered by them at the time; that the plaintiffs, in good faith, endeavored to comply with the conditions of said contract, on their part, in every respect, and that an exact compliance therewith, in every respect, became and was impracticable." The plaintiffs gave evidence tending to prove the issues on their part, after which the defendant introduced evidence tending to controvert the plaintiff's evidence and to support the issues tendered by the defendant, after which the court gave numerous instructions to the jury, as follows:

(1) "The plaintiffs having undertaken by their contract to remodel the defendant's mill, and so construct it that it shall thereafter have a capacity of sixty barrels of flour in twenty-four hours' time, and should be capable of making as good flour, and as much per bushel of wheat, as any mill in Eastern Oregon, when grinding the same kind of wheat, are bound to a *strict performance* of the terms of their contract in each of these particulars; and if you find that the plaintiffs failed to perform their contract *fully in any one of these respects*, but that said mill, as turned over to the defendant, in September, 1886, was intrinsically incapable of accomplishing such results, and that the

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plaintiffs voluntarily abandoned their work before said mill was made to fully comply with said contract in these particulars, they have no right of recovery in this action, and your verdict must be for the defendant, unless you find that such performance was prevented or waived by the act of the defendant, or that some service of value above the amount actually paid was rendered by the plaintiffs to the defendant and by it voluntarily accepted; or unless you find that the contract after its execution was modified by the defendant's agreement to increase the power, and that such increase of power might have made the mill fulfil the guaranty of the contract."

(2) "An acceptance within the terms of the last instruction must be one in regard to which the defendant had an option to take or reject. It must be voluntary. The fact that the defendant took possession of the mill in controversy, in the condition in which it was left by the plaintiffs, is not to be held to prejudice any right it may have to resist the payment herein sought to be enforced against it. It had a perfect right to take possession of said mill and operate it to the best advantage possible under the circumstances, and from this fact alone the defendant is not to be held to have waived the performance of any stipulation resting upon the plaintiffs or to have excused any default into which you may find the plaintiffs fell in the execution of the contract in the particulars above referred to."

(3) "Before the plaintiffs had a right to call on the defendant to accept the mill and make final payment specified in the contract, it was incumbent on them to demonstrate by an actual test that the mill as remodeled by them would grind sixty barrels of flour in twenty four hours' run, by actually grinding that amount, and that it would make as good flour and as much per bushel as any mill in Eastern Oregon, when grinding the same kind of wheat; and, having failed to establish such test by evidence, your verdict must be for the defendant, unless you find that they were absolved from so doing by some modification or rescision of the contract."

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(4) "I charge you that under the written contract entered into between the parties, the plaintiffs were under obligation to build a mill which would accomplish the stipulated results with the water-power as it existed at the time of the execution of the contract, and you will be so governed in arriving at your verdict, unless you find that the contract was, after its execution, modified by a further agreement whereby the defendant undertook to supply a greater power."

The court, of its own motion, gave the following charge:

(5) "But I instruct you that the provisions in this contract that plaintiffs should construct a mill of sixty barrels capacity, and capable of making as much flour and of as good quality from a bushel of wheat as any other mill in Eastern Oregon, were of the essence of the contract, and in this respect plaintiffs are bound to establish to your satisfaction that these terms were complied with before they can recover, or that they were absolved from so doing by some modification or rescision of the contract, or were excused or prevented by defendant from so doing."

The court refused to give the following charges requested by appellant's counsel:

"If you find from the testimony that the plaintiffs constructed the mill mainly according to the written contract, that the work was done and the material and machinery furnished in good faith with the intent on the part of the plaintiffs to comply with said contract, and that the plaintiffs did not wilfully abandon the performance of said contract, then the plaintiffs are entitled to recover from the defendant the reasonable value of said work, material and machinery, not exceeding the contract price, less all payments heretofore made, and what it would cost to remedy the defects in said mill, and to make it correspond with said contract."

A verdict was returned for the defendant, upon which a judgment was duly entered, from which this appeal is taken.

W. M. Ramsey, for Appellants.

L. B. Cox and *R. Eakin*, for Respondent.

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STRAHAN, J., delivered the opinion of the court.

Upon the trial in the court below exceptions were taken to each of the foregoing instructions and also to the refusal of the court to give the instruction asked by the appellants. The correctness of these rulings presents the only question necessary to be considered on this appeal. The instructions given by the court practically present but one question, and that is, whether or not, where a mechanic or builder binds himself by a written contract to erect or repair a building or machinery, and he performs, not literally according to the terms of the contract, but still in such a manner as to be of some value to the owner, and the owner accepts it and uses it, in an action on a *quantum meruit*, he may recover for the reasonable value of such labor or materials, notwithstanding his failure to substantially perform the written contract. The instructions given by the court in effect declare that no recovery can be had in such case, while the one asked on the part of the plaintiffs, and which was refused by the court, states the converse of that proposition. An examination of what is the correct rule of law on that subject therefore becomes necessary. In making this examination it will be more convenient to first consider the instruction which the plaintiffs requested, because if that stated the law correctly the instructions given by the court were necessarily incorrect.

1. In a case like the one under consideration, "the law implies that the work done and the materials furnished were to be paid for. The *general* rule of law is, that while a special contract remains open,—that is, unperformed,—the party whose part has not been done cannot sue in *indebitatus assumpsit* to recover a compensation for what he has done until the whole shall be completed. But the exceptions to that rule are in cases in which something has been done under a special contract, but not in strict accordance with that contract. In such case, the party cannot recover the remuneration stipulated for in the contract, because he has not performed that which was the

consideration of it. Still, if the other party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise on his part to pay such as the benefit conferred is really worth; and, to recover it *indebitatus assumpsit* is maintainable. Such is the law now in England and in the United States, notwithstanding many cases in the reports of both countries are at variance with it." Mr. Justice Wayne in *Dennotts v. Jones*, 23 How. 240; L. ed., 240, book 16, pp. 442, 448; *Stillwell v. Phelps*, 130 U. S. 520; L. ed., book 32, p. 1035.

"The defense is that it was not done in a workmanlike manner. In such case the rule is well established that the plaintiff may recover on a *quantum meruit* and *quantum valebat* what the work done and materials furnished were worth, where, as in this case, the parties cannot rescind and stand *in statu quo*, but one of them must derive benefit from the labor of the other." Mr. Justice Works in *Katz v. Bedford*, 77 Cal. 319-321.

Trowbridge v. Barrett, 30 Wis. 661, was an action to recover for a balance due for putting up a stationary engine and boiler, where it appeared that the plaintiff had not fully performed his part of the contract, and the court said: "There is no arbitrary rule of law, which, in violation of every principle of natural justice, defeats the plaintiff's right of recovery in such case, and permits the defendant to enjoy the fruits of such labor and expenditure without making remuneration therefor. The defendant had the right to recoup all damages sustained by him by reason of the failure of the plaintiff to fully perform his contract with him." This doctrine is supported by an overwhelming weight of authority. *Newman v. McGregor*, 5 Ohio, 349; *Allen v. McKibbin*, 5 Mich. 449; *Howell v. Medler*, 41 Mich. 641; *Hayward v. Leonard*, 7 Pick. 180; 2 *Parsons on Contracts*, 523; *Woodward v. Fuller*, 80 N. Y. 312; *Heckman v. Pinkney*, 81 N. Y. 211; *Cutter v. Powell*, 2 Smith's L. C. 61; *Dermott v. Jones*, 2 Wall. 1. And this court is fully committed to the same doctrine. *Steeple v. Newbon*, 7 Or.

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110; *Tribone v. Strowbridge*, 7 Or. 157; *Todd v. Huntington*, 13 Or. 9.

Without in any manner entering upon the discussion of the conflicting opinions and reasons to be found in the books on this vexed subject, it is sufficient to say that these cases are decisive of the question presented by the instruction under consideration. It stated the correct rule of law as announced by this court in the three cases above cited and the same should have been given. It results also that the instructions which were given by the court, and which are contrary to the doctrine of these cases, were erroneous and should not have been given. In the trial of this case the court below evidently undertook to apply what was said by this court in *Gove v. The I. C. M. & M. Co.*, 16 Or. 93, to the facts disclosed by this record. That was an action between the same parties founded upon the written contract, and it was held that before the plaintiffs could recover on that contract, they must show a compliance with its terms. This is an action on a *quantum meruit* to recover the reasonable value of the material and labor, and we hold that it will lie. This distinction is noted in several of the cases above cited, and particularly in *Todd v. Huntington*, *supra*. Upon the re-trial of this action in the court below the plaintiffs will be entitled to recover whatever amount they can show their work and material placed in the defendant's mill were reasonably worth subject to the right of the defendant to *recoup* from that amount such damages as it has sustained by the deviations from the written contract by the plaintiffs. These are the questions upon which the rights of the parties depend, and no doubt the trial court will exercise the power of amendment liberally so as to fully present them for trial before a jury.

The judgment appealed from must be reversed and the cause remanded to the court below for a new trial.

Opinion of the Court—Lord, J.

[Filed June 10, 1890.]

19	371
448	497

A. E. EATON, RESPONDENT, v. THE OREGON RAILWAY & NAVIGATION CO., APPELLANT.

ACTION FOR KILLING STOCK ON UNFENCED ROAD—PLACE OF ENTRY NEED NOT BE ALLEGED.—Under the statute for killing or injuring live stock on an unfenced track, it is not necessary to allege the point at which the animals entered upon the track of the railroad.

PLACE OF ENTRY—WHEN PROOF OF UNNECESSARY.—Nor is proof of entry material except where stock is killed at a place where the company is not bound to fence, as a public highway, which has entered where its track was unfenced, and the duty to fence existed, and such killing is the direct consequence of the neglect to fence.

UNFENCED ROAD—WHAT IS SUFFICIENT PROOF OF NEGLIGENCE.—When it is alleged and proved that the company failed to fence, and that the plaintiff's stock was killed or injured upon or near such unfenced track by a moving train, the negligence is established and can only be defeated by proof of contributory negligence or misconduct.

APPEAL from Union county: JAS. A. FEE, judge.

This is an action to recover damages, and the complaint contains six counts, five of which are to recover damages for killing and injuring stock belonging to the plaintiff by moving trains of the defendant railroad company, and the last for the destruction by fire of grass, etc., and to which further reference will not be made, as no error is suggested. The trial resulted in a verdict and judgment for the plaintiff, from which the defendant has brought this appeal.

W. W. Cotton and Gilbert & Snow, for Appellant.

R. Eakin and T. H. Crawford, for Respondent.

LORD, J., delivered the opinion of the court.

The first objection is directed to the refusal of the court to give certain instructions asked by the defendant and designed to raise the question as to the liability of the company for live stock killed by its moving trains where such stock stray upon the track at some point where the company is not required to fence by the statute, but to which instructions it is certified to us in the bill of exceptions that they were refused by the court for the reason that there was no evidence tending to show where the animals entered upon the track. The object of the first

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of such instructions refused was to question the sufficiency of the following allegation: "That the track and grounds of the defendant at the point where said animals were so killed and destroyed were not fenced by the defendant as required by law." This objection is made on the hypothesis that the point of entry on the track must be distinctly alleged, otherwise the allegation is defective. Without conceding it, but for the purposes of the argument only, it may be admitted that the allegation is defective in the particular claimed, and that if subjected to the test of a demurrer would be held to be insufficient, and yet we think if the defect claimed be a defect, it was cured by the verdict. The allegation is that the stock was killed at a point on the defendant's road where it was required by law to fence its track, but it does not allege that the track was not fenced at the point where the stock entered upon the track. If the stock was killed at a place along the line of the railroad track where it was not fenced, but where the company was required to fence, as alleged, it is plain that the stock were not killed by an injury originating on a public highway or other place where the company was not required to fence by law. As the averment is that the track was not fenced where the stock was killed, and the duty to fence was imposed by law, this language may mean there was no fence anywhere along the track, or that the track was fenced, except where the stock was killed, and in either case the implication is that the track was not fenced where the stock entered upon the track. In such cases, it is fair to assume, after verdict and in support of the judgment, that the omitted fact was proven. But in actions of this character, predicated upon an omission to fence, if the stock is killed at a place where the company is obliged to fence but has failed to do it, the jury is justified in presuming that such stock entered upon the track at that place. Mr. Wood says: "When cattle are injured or killed at a place where the company has failed to fence, or to maintain a sufficient fence, the jury is justified in presuming that they entered

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upon the track at that place.” 3 Wood on Railroads, § 422, p. 1566. So that if the evidence is that the road was not fenced at the place where the stock was killed, but where the law imposed the duty to fence, the presumption is that the stock got upon the track at the place where it was killed.

In *Railroad Co. v. Casner*, 72 Ill. 384, it was held that an action against a railroad company, where the evidence is that the road was not fenced at the place where the stock was killed, it is but a fair inference that the stock got upon the road at the place where it was killed. When, therefore, the want of a fence where the duty to fence is shown, and the killing of the stock is proven, the presumption is, and the jury are authorized to find, that the stock entered upon the track at that place. So that, after verdict, and in support of the judgment, especially when the court certifies there was no evidence showing where the stock entered upon the track, the defect in the allegation is cured by the inference that they entered upon the track where they were killed, and that the jury so inferred by their verdict. In the case of *Railroad Co. v. Casner*, *supra*, the claim was, that the evidence did not show the place where the stock got upon the track, but the court said: “But the evidence was that the road was not fenced where the stock was killed, and, in the absence of any other proof, it would be but a fair inference that the stock got upon the road at the place where it was killed.” It does not seem to me the objection is tenable in any view. But I do not understand the statute requires that the point of entry be alleged. Section 4048 provides that in every action to recover the value of live stock mentioned in section 4044—that is, killed on an unfenced track—“so killed, * * * proof of such killing or injury shall of itself be deemed and held to be conclusive evidence in any court of this State of negligence.” So that when it is alleged and proved that the defendant company failed to fence, or its track was unfenced, and that the plaintiff's stock was killed or injured upon or near the track by a moving

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train, the negligence is established, and can only be defeated by proof of contributory negligence or misconduct on the part of the plaintiff.

In *Hindman v. Railroad Co.*, 17 Or. 619, THAYER, C. J. in construing these identical provisions, said: "Under these provisions, it would seem that a plaintiff is entitled to recover against a railroad company for the killing or injury of his stock by alleging and proving that the company owned or operated the railroad; that its track was unfenced, and that the plaintiff's cattle or horses were killed or injured, as the case might be, on or near the track by a moving train, engine or cars upon said track; that the company will be allowed to defeat the recovery by proof of contributory negligence, etc. It would seem to be plain from the statute, and the construction given to it in *Hindman v. Railroad Co.*, *supra*, that it is not necessary to allege or prove the point of entry or that proof of entry is material except when the stock is killed where the company is not bound to fence, as a public highway, which has entered where its track is unfenced, and the duty to fence was imposed, and such is the direct consequence of the neglect to fence. In such a case, the killing or injury, although it took place on a highway, owes its inception to the neglect or omission of the company to fence its track, and is the direct and proximate result of it; and, in legal contemplation, the place of the injury is inseparably connected with the cause of the injury, which is the ground of the action and within the statute. In cases of this sort, in order to show that the killing of the stock was within the operation of the statute, although it occurred at a place outside of it, the plaintiff would be required to show that the stock entered the track where the law required the company to fence, but where it had omitted to do it, and that the killing was the direct and proximate result of it. While, therefore, the allegation might be better stated, it is not subject to the objection urged.

The other instruction refused and excepted to was intended, as the argument indicates, to throw upon the

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plaintiff the burden of showing the point at which the stock entered upon the track, the claim being that the evidence showed that some of the animals killed were killed upon the track at a point where the public highway crosses the railroad track. The view already expressed will relieve us of the duty to say more in respect to the point of entry, except to add that in our judgment the evidence does not show that the cattle were killed or strayed upon the track at a public crossing. It shows that the animals were killed at points where the law required the company, but where it had failed, to fence, although some of them were killed near the crossing, and in such case it is not necessary for the plaintiff to prove where the entry on the track occurred, for these facts, under the statute, constitute negligence. Nor as disclosed by the facts upon the record do we think the court erred in refusing the other instruction upon the ground indicated. As to the constitutional objection raised to the act, it is sufficient to refer to *Sullivan v. Railroad Co.*, which is adverse to the contention set up.

It follows that the judgment must be affirmed.

[Filed June 18, 1890.]

G. W. NUTTER, APPELLANT, v. B. GALLAGHER,
RESPONDENT.

19	375
37	12

NAVIGABLE STREAM—WHAT IS.—A stream, or water-course, in order to be navigable, must be of sufficient extent and capacity to enable the community at large to utilize it in the navigation of boats and other water-craft thereon, for the transportation of products and merchandise; or for the purpose of floating logs and timber from forests to market.

CASE IN JUDGMENT.—Where N., desiring to open a way of navigation to a certain point on a navigable tide slough, situated upon the land of G., which joined his premises, cleared away logs and brush from a gulch through which flowed a small mountain stream, deepened the same, and cut a channel therefrom through the intervening land of G. to such point of navigation, thereby opening a water-course between his premises and said point, by means of which he was enabled to float logs and small boats thereon at extreme high tides, which occur but a few days during the year; and it appearing that the communication so established was merely for the use and benefit of N. and those who might succeed him in the ownership of his premises: *held*, that such water-course did not constitute a navigable stream in the sense and meaning of the term as legally understood. *Haines v. Hall*, 17 Or. 165, approved.

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APPEAL from Clatsop county: F. J. TAYLOR, judge.

The appellant brought suit against the respondent to enjoin him from erecting an alleged obstruction to the navigation of a certain slough in said county termed by him "Vincent's slough." He alleged ownership in fee and possession of the west half of the northwest quarter of section 15, township 7 north, of range 9 west, in said county; that for the last five years he had occupied said premises as a home; that they are situated about three quarters of a mile from Young's river, a navigable stream, wherein the tide ebbs and flows, and the only way the appellant can get to and from them, or can carry or transport the products of the said land to market, is upon a body of water extending from said Young's river to the said premises, called and known as "Vincent's slough," which is a natural waterway, navigable for boats, saw logs, scows and other water-craft; and that without the use thereof for such purposes, it will be impossible for him to have ingress and egress to and from the premises; that said slough has been from time immemorial navigated by the public generally in the manner aforesaid. The appellant also alleged that he was and had been for six years past the owner of a large scow and other boats, and during all that time had navigated said slough and transported thereon the products of his land and wares and merchandise to and from market; that since the commencement of the suit, a county road had been laid out and established, leading from his land down the south bank of said slough to a point on respondent's land where a bridge on another county road crossed the slough; that the road leading from respondent's land connected with the bridge, and he could transport his supplies and products to and from the land over such road to the bridge, and from the bridge upon the slough to and from market; that the water in the slough at the bridge was deeper and navigable for larger craft than on his land; that respondent was threatening to entirely close the entrance to the slough by diving in the bed thereof large

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piling, and filling between with brush and other material, causing thereby great and irreparable injury and damage.

The respondent denied the material allegations contained in the complaint, and for a further answer alleged that he was owner and in possession of lots Nos. 5 and 6 in section 10, township 7 north, range 9 west, in Clatsop county, Oregon, which premises lie north of and adjoin said land of appellant, and that said slough was wholly within respondent's premises and was not subject to public navigation, but was necessary for the free use and enjoyment of his land; that said land is known as "tide land" and is only productive and useful by being diked and reclaimed; that to reclaim it he will be compelled to dike a portion of it, which diking is the obstruction complained of by appellant.

A reply was filed on the part of the appellant denying the new matter set forth in the answer.

The case was thereupon referred to J. Q. A. Bowlby, Esq., to take testimony and report the facts and conclusions of law. The said referee thereafter made his report in which he found: That the said parties were owners, respectively, of the said parcels of land hereinbefore referred to, and were in possession of the same as alleged; that said Young's river was a navigable stream in which the tide ebbs and flows, and that it runs a northerly course, near the said lands and east thereof; that a small stream coming from the hills flows across appellant's land and down through sloughs across the land of respondent to Young's river near by; that the tides rise in Young's river and back the water in these sloughs and this stream on to the said lands; but only high tides and winter freshets increase the depth of the water in the stream on the appellant's land; that the highest tides of summer only raise the water on the land of the latter a few inches, but the highest winter tides and freshets raise it two or three feet. Such freshets only occur two or three times during a winter; that on said stream, and on the respondent's land about twelve rods below the south line of appellant's land, is a landing known as "Vincent's landing," to which

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boats and scows run from Young's river and bring and carry away freight; that in the years 1851 and 1869 persons ascended with boats from Young's river the said slough and stream to a point on respondent's land four or five rods above Vincent's landing, to where lay a large log across the slough, now known as the "foot log." The water there at that time was three feet deep at neap tide and six feet deep at new moon tide. That above the foot log, to the respondent's land, the channel was obstructed with logs and overhanging bushes; that prior to 1878 the channel from Vincent's landing to a short distance below was from four to six feet wide and about the same number of feet in depth, and high tides would fill and overflow the channel to a depth of some two feet; that in the year 1878 the then occupant of appellant's land, with the consent of R. Vincent, then occupant of respondent's land, cut out the foot log and cleared the logs and bushes out of the stream and slough, and cut away the points at crooked places thereof, so that small boats could pass from appellant's land to Young's river and return at high tide; and about the same time the channel below Vincent's landing was so improved that large boats, wood scows, steamers and vessels, ran to that point; that subsequent to 1882, appellant, with the consent of the then owners of respondent's said land, further improved the channel between his land and Vincent's landing, so that saw logs were run down during winter freshets. He also, on high tides, boated wood, hay and supplies on scows, seven by twenty feet, from his place to said landing; that the appellant, prior to bringing the suit, had no public way of getting to market other than through this water-course, but that since the commencement of the suit a county road had been laid out from his land to a point on respondent's land at or near the end of a bridge, which within the (then) past year had been built across said slough about two rods above Vincent's landing; that another county road crosses said bridge connected with the road above referred to, and ran across the respondent's land down to a navigable point

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on the slough below where respondent desired to dam the water-course in controversy, which was somewhere below Vincent's landing; that said county road from the bridge to said navigable point ran part of the way on a dyke, and was not yet open to convenient travel; it cannot be traveled with a wagon; that the distance from the bridge to the navigable point was about three-quarters of a mile; that the land of respondent, through which the said water-course ran, was low and subject to overflow by high tides, and the appellant desired to dyke and dam the slough in order to reclaim it and thereby greatly enhance its value; that to dyke it so as not to cross the water-course would be more expensive than the manner proposed by respondent, and the latter would lose eight or ten acres thereof; that there were about 40,000 feet of timber which could be taken from appellant's land down the stream and water-course, besides wood and farm products, if they were kept open. Upon which said facts the referee found as conclusions of law that the water-course in controversy was navigable from the bridge to Young's river and subject to public use; that between the bridge and appellant's land the same was not subject to public use, but was the private property of respondent; that respondent had no right to obstruct said water-course below said bridge.

The said report of the referee having been duly filed, the appellant's counsel moved the court to confirm it, and the respondent's counsel moved to set it aside; whereupon the said court found as facts, that the respondent, at the time of the bringing of the suit, was the owner and in possession of lots 5 and 6 of section 10, township 7 north, range 9 west, in Clatsop county, Oregon, and that said lots were adjacent to the north boundary line of appellant's said claim; also that since the commencement of the suit a county road had been laid out from the land belonging to appellant to a point on respondent's land at or near the end of a bridge that crosses the said slough some two rods above a point thereon known as "Vincent's landing," where it connected with another county road, which ran

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across the land of respondent to a point on said slough where the same was navigable, and which said point was below where respondent proposed to dike said slough; that during and since the year 1878 the occupants of appellant's land had, with the consent of occupants of respondent's land, cleared out, dug out and straightened the said slough, from below or south of said "Vincent's landing," on respondent's land, up south on to appellant's land, so that small, flat-bottomed boats could be navigated thereon at high stages of water, and logs could be floated out thereon at new and full moon tides; but that prior to such digging, clearing and straightening, when the said slough was in its natural state, it could not be navigated with boats and logs, except at extreme high winter tides, above the point known as "Vincent's landing," which point was entirely and wholly upon respondent's land, and could not be reached from appellant's land by any public highway nor otherwise than by crossing the land of the former. And the said court thereupon set aside all the findings of fact of the said referee inconsistent with its findings of fact as above set out. Said court also set aside the conclusions of law as found by the referee, and instead thereof found the following: "That Vincent's slough is not a navigable slough above the point known as 'Vincent's landing,' and that, therefore, plaintiff is not entitled to the relief prayed for in his complaint; but that this suit should be dismissed."

Upon this finding of facts and law by the court, a decree was rendered dismissing the suit, at the cost of the appellant, which the decree appealed from.

George C. Fulton, for Appellant.

F. D. Winton, for Respondent.

THAYER, C. J., delivered the opinion of the court.

The main question in this case is whether the respondent, at the time of the commencement of the suit, was obstructing and threatening to obstruct a navigable water-

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way leading from appellant's land across the land of respondent into what is known as "Young's river." The testimony bearing upon the question is rather voluminous but extremely vague upon some of the material points in the case.

The appellant contends that a certain slough, known as "Vincent's slough," extends from his land, either directly to Young's river or into other sloughs connecting with it, constituting an uninterrupted course of navigable water from his premises to said river, which is admitted to be a navigable stream.

It appears that said Vincent's slough extends across a part of respondent's land south toward the land of appellant, and that a slough or gulch, in which flows a small stream of water, runs from the appellant's land into it; but that ordinary flood tides reach the appellant's land through said slough or its branches, is strongly controverted by the testimony of the respondent.

It does appear, however, that the appellant, his grantors and predecessors, opened a channel from said slough or gulch upon his land into said Vincent's slough at a point known as Vincent's landing, by clearing the logs and brush from the gulch, deepening the channel thereof, and cutting a channel or ditch through solid ground, and that he used the same at extreme high tides to float saw logs from his premises to said slough at said point, and for other purposes, as found by the circuit court in its findings of fact. Whether this improvement of the channel renders Vincent's slough navigable from appellant's land to Young's river is, as I understand, the real point in issue between the parties. The circuit court decided that Vincent's slough was not a navigable slough above Vincent's landing, and I think its conclusion upon that point was clearly correct.

This court in *Haynes v. Hall*, 17 Or. 165, held "that the doctrine that a stream of water is navigable if of sufficient extent and capacity to float logs and timbers from mountainous regions to market, and might thereby be utilized

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for the benefit and advantage of the community at large, could not be extended so as to include small streams of only a few miles in length, although they rise during a few weeks in the year sufficiently high to be used to a limited extent by the application of artificial means, to float logs and timber a short distance." In the present case the stream or water-course from appellant's premises to Vincent's landing was only a few rods in distance, and between those two points it had no capacity for general purposes of navigation. No one but the appellant can utilize it, and he cannot only for a few days during the year. There is no pretense that it can be of the slightest service to the public generally, or that it was intended to be so. Those who made the improvement did so for the sole benefit of the owners and occupants of the land now belonging to appellant, and if it were done with the consent of the owners of the land now belonging to respondent, it would only amount to a temporary license, as a permanent right in favor of the appellant to maintain such a channel across the land of respondent could only be created by grant, or by prescription, which presumes a grant. If the question, therefore, whether the appellant's right to have the respondent enjoined on account of the matters alleged in the complaint, depends upon the navigability of the slough from Vincent's landing to appellant's premises, he must necessarily fail. But whether or not that is a vital point in the case, I have been unable to learn from the pleadings, proofs and findings referred to in the foregoing statement. They vaguely hint that the respondent is diking his land somewhere below said landing; in what manner, however, he is doing it, or at what particular locality it is being done, does not appear. If he is doing the diking in such a manner that it will obstruct the navigation of the slough to said landing from points below there, he is doubtless doing a wrong; but that fact, so far as I can discover from the transcript, is in the dark. The circuit court, it appears, dismissed the appellant's complaint upon the ground that the slough was not navigable above Vincent's landing, and

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in the absence of any showing that the diking would interfere with its navigability or with the rights of the appellant, we must conclude that it would not affect either.

Hence the decree appealed from must be affirmed.

[Filed June 13, 1890.]

C. C. BEEKMAN, RESPONDENT, v. JAMES HAMLIN,
APPELLANT.

JUDGMENT—LAPSE OF TIME—PRESUMPTION OF PAYMENT.—In this State a judgment upon which no execution has been issued, nor attempt made to enforce the same for twenty years, is presumed to have been paid.

PRESUMPTION—EFFECT OF.—In such case, it is a presumption of law and can be rebutted only by some positive act of unequivocal recognition, like part payment, or a written admission, or at least a clear and well-identified promise, intelligently made, within the period of twenty years.

APPEAL from Jackson county: L. R. WEBSTER, judge.

This is a proceeding to revive a judgment under section 295, Hill's Code. The plaintiff alleges in his motion for leave to issue execution that on the fifth day of February, 1861, he recovered a judgment against the defendant in the circuit court of Jackson county, Oregon, in an action at law in which said C. C. Beekman was plaintiff and said James Hamlin was the defendant, for the sum of \$751.43 with interest thereon from said date at the rate of one and a half per cent per month, and also for the further sum of \$756.32 with interest thereon at the rate of two and a half per cent per month, and the costs and disbursements of said action, which judgment was duly entered on the journal record of said court on the fifth of February, 1861, and on the twenty-eighth day of February, 1861, was duly entered on the judgment lien docket of said court; that no payments have been made on said judgment, and that the whole amount of principal and interest as therein stated is now due to the plaintiff; that no execution has been issued on said judgment for more than twenty years. Then follows a prayer for leave to issue an execution for said sums with interest at the rate specified in the motion.

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The defendant's answer contains some denials, but they are not full or specific, leaving it somewhat uncertain what the defendant intended to deny. The answer alleges that the defendant was not served with notice of the filing of the amended complaint in the original action. After alleging some other argumentative matter that has no relevancy whatever, the answer contains this allegation: That said alleged judgment has been allowed to remain dormant for about twenty-eight years, during all of which period the defendant has owned property, both real and personal, in his own right, which property was subject to execution, and which was amply sufficient to have satisfied said judgment; and the defendant avers that for about the period of twenty-eight years he was absolutely ignorant that the said alleged judgment appeared of record against him, and that during that period of time he had several settlements with the plaintiff, had money and other articles of value deposited with him and in his care, and withdrew the same from his care at defendant's pleasure, and that during all that period of time and not until the last settlement was had between the plaintiff and defendant did the plaintiff mention the fact that he held the alleged judgment against the defendant. Some other facts are alleged which need not be specially noticed.

The record recites that the court sustained a demurrer to subdivisions three and five of the defendant's answer; but the demurrer nowhere appears in the transcript, nor does it anywhere appear on what ground said demurrer, if any was filed, was sustained. On the trial the defendant offered evidence tending to prove the matter in his answer, all of which was objected to and excluded and exceptions taken. At the trial the plaintiff introduced a certified copy of the judgment roll in the case of *Beekman v. Hamlin* and rested. The defendant sought to introduce evidence tending to prove facts showing that said judgment had been paid; that is, that several times after the rendition of the judgment said parties had various business transactions and full settlement; but all of this evidence was

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excluded and exceptions taken. The court then directed a verdict for the plaintiff.

Francis Fitch, for Appellant.

P. P. Prim, H. K. Kanna and C. W. Kahler, for Respondent.

STRAHAN, J., delivered the opinion of the court.

The judgment sought to be revived in this case was rendered on the fifth day of February, 1861, and the record does not show that any execution was ever issued thereon. This proceeding was commenced on the nineteenth day of March, 1889, so that more than twenty-eight years intervened between the date of the entry of judgment and this attempt to enforce it. The only question I have thought it necessary to consider is, what effect has the lapse of time upon the right to enforce this judgment, independent of the statute of limitations; in other words, what would be the rights of the parties in this case if no statute of limitations were in force in this State. And this presents the question, what effect has the lapse of time, in this State, upon the right of a party to have a judgment renewed by the statutory proceedings. Does the common law presumption of payment after twenty years arise in such case, and what is its effect? Section 172, Wood on Limitation of Actions, says: "In all those States where sealed instruments or 'specialties,' as they are technically called, are expressly brought within the statute, the statute begins to run from the time when a cause of action arises thereon, and the bar is complete at the expiration of the statutory period, while in those States in which this class of instruments are not provided for, the common law presumption of payment attaches from the time when the cause of action arises and becomes complete as a presumptive bar at the expiration of twenty years from that time; and the mere lapse of twenty years without any demand of itself, raises a presumption of payment." And the same author says in section 30 of the same work that a judgment obtained in the United States court or in the

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court of the State where the remedy is sought, is within the provisions of the statute; that is, the statute in relation to specialties,—twenty years. The rule of presumption, when traced to its foundation, is said to be a rule of convenience and policy, the result of the necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined, until time has involved them in uncertainty and obscurity, and ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them. After stating the inconveniences which necessarily result from a contrary rule, the court in the same case says: "In a word, the most solemn muniments are presumed to exist in order to support a long possession; the most solemn of human obligations lose their binding efficacy and are presumed to be discharged after many years." *Foulk v Brown*, 2 Watts, 216.

So in *Tilgman v. Fisher*, 9 Watts, 441, the court said: "Such a lapse of time, in the absence of repelling evidence, is sufficient in law, without more, to raise a presumption of payment that would be binding upon both court and jury, so as to entitle the defendant, under a plea of payment, to a verdict and judgment in his favor. But being merely a presumption of the defendant's having made payment, it may be rebutted by proof of intervening circumstances, such as a demand of payment, payment of part by the obligator, his admission that the debt is still due, or his inability to pay it within the twenty years."

And in *Rhodes, Ex., v. Turner and wife*, 21 Alab. 210, the principle under consideration was directly applied to a judgment, the court saying: "If a final judgment had been rendered, according to the principles of the common law it would be presumed to have been paid after the expiration of twenty years; and if the parties allowed this period to elapse, without taking any steps to compel a settlement,

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we think the presumption of payment arises, and the executor or administrator should be exempted from the necessity of hunting up evidence to prove accounts and vouchers which ordinarily enter into such settlements, and which, after such a lapse of time, it would, perhaps in most cases, be impossible for him to obtain." So in *Simms v. Augsterry*, 4 Strob. Eq. 103, the court applied the same principle after a very careful examination of the subject. After adverting to the statute of limitations as one of the means of giving repose to stale subjects of litigation, the court remarked: "We have another system of rules, founded upon what is called the doctrine of legal presumptions, which prevail alike in courts of law and equity, and which are eminently subservient to the quieting of titles, and the prevention of litigation arising upon obscure and antiquated transactions. If these legal presumptions require a longer period than statutory bars to acquire force and effect they are more general in their operation. They are highly conducive to the peace of society and the happiness of families; and relieve courts from the necessity of adjudicating rights, so obscured by time and the accidents of life, that the attainment of truth and justice is next to impossible. * * * These legal presumptions by which conflicting claims and titles are set at rest, I have endeavored to show are natural and necessary. They spring spontaneously out of the institutions and relations of property. As to the precise time at which they arise, each independent community must judge for itself. We have adopted the law of the mother country. In South Carolina, as in England, by the lapse of twenty years without admission, specialties and judgments are presumed to be satisfied and trusts discharged." And *McArthur v. Carrie's Adm'r.*, 32 Alab. 75, is a very carefully-considered case and to the same effect. And this is followed by *Goodwin v. Baldwin*, 59 Alab. 127. Many other authorities are to the same effect. *Ray v. Pearce*, 84 N. C. 485; *Olden v. Hubbard*, 34 N. J. Eq. 85; *Lyon v. Adde*, 63 Barb. 89. In this latter case the court states what we conceive to be the

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correct rule, thus: "In the case of an obligation which can be extinguished by an act *in pais*,—such as payment,—there is an absolute presumption of payment after twenty years. It is a presumption of law, and can be rebutted only by some positive act of unequivocal recognition, like part payment, or a written admission, or at least a clear and well-identified promise or admission, intelligently made, within the period of twenty years." And in *Olden v. Hubbard*, *supra*, it was expressly averred in the bill that non-payment had been made on the mortgage which was sought to be foreclosed for more than twenty-three years, and that the principal and interest were then due and owing; and on demurrer to the bill it was held, that while the demurrer admitted all material facts, these statements were not admitted because they were rather conclusions than averments of facts; and it was further held that any existing facts which would repel the presumption of payment must be averred in the bill.

In *Cope v. Humphreys*, 14 Serg. & R. 15, it was held that after the lapse of twenty years a judgment is presumed to have been satisfied unless there be circumstances to account for the delay. And in the opinion of the court in that case, Peake's Ev. 481 is cited where it is stated that twenty years is presumption of payment of a bond, and the same rule applies to a *scire facias* for execution on a judgment. And *Miller v. Smith's Exor.*, 16 Wend. 425, is to the same effect. It is not possible to site all the cases bearing on this interesting subject, but the following may be added as additional illustrations of the principle involved: *The State of Tennessee v. Cherry*, 36 Ga. 388; *Roe v. Willingham*, 47 Ga. 540; *Whitney v. French*, 25 Vt. 663; *Anderson v. Settle*, 37 Tenn. 202; *Diamond v. Tobias*, 12 Penn. St. 312; *Reynolds v. Green*, 10 Mich. 356; *Howland v. Skirtliff*, 2 Met. 26; *Anderson v. Smith*, 3 Met. (Ky.) 491; *Cheever v. Perley*, 11 Allen, 584; *Inches v. Leonard*, 12 Mass. 379; *Summerville v. Holliday*, 1 Watts, 507; *Freeman on Judgments*, § 464; 1 Greenleaf Ev. § 39.

2. The foregoing authorities hold with great uniformity

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that the lapse of twenty years creates a presumption of law that specialties, including judgments, have been paid, but this presumption is not, under all circumstances, absolutely conclusive. It may be disputed and overcome; in what manner this may be done, or what shall be sufficient to produce that result, the authorities are not agreed. Some of the authorities hold that any evidence tending to prove non-payment may be sufficient; that the fact must be found by the jury, and that any evidence ordinarily competent on the question of payment, if it satisfies the jury, is all that the law requires. Another class of cases, and which we think have the better reason to support them, hold with *Lyon v. Adde, supra*, that this presumption is one of law and can be rebutted only by some positive act of unequivocal recognition, like part payment or a written admission or at least a clear and well-identified verbal promise of admission intelligently made within the period of twenty years. So, in *Cheever v. Perley, supra*, it was held if parol evidence was relied upon to control the presumption, it should clearly show some positive act of unequivocal recognition of the debt within that time, that is, within twenty years. And in *Summerville v. Holliday, supra*, it is said that it is not so much a presumption that the money has been paid or a right of way granted as it is the substitution of an artificial rule in the place of evidence or belief, after a delay which may have been destructive of the evidence on which a belief might be justly founded. So also in *Whitney v. French, supra*, Chief Justice Redfield, in speaking of this presumption, said: "It is a presumption of law and in itself conclusive unless encountered by distinct proof. It is not to be submitted to the discretion of a jury, although adversely an inference of fact, where there is any conflicting evidence. And this presumption of the payment of a mortgage or release of an estate is often made against what is believed to be the very fact, for the purpose of quieting a long adverse possession, and to prevent virtual fraud, by the setting up of dormant title long since supposed to have become extinct."

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3. The pleadings in this case are so framed that it was hardly possible to properly try the real questions upon which the rights of the parties depend. The defendant, instead of directly pleading in his answer that he had paid the judgment mentioned in the plaintiff's pleading, alleged evidentiary facts, which, if proven, would have tended very strongly to establish the fact of payment. This was bad pleading on the part of the defendant; but the objection I think ought to have been taken by motion and not by demurrer. It related more to the form of the pleading than it did to the substance; but there is neither demurrer nor motion in the record, and we cannot know just what objections were urged against this pleading, nor in what form, further than is recited in the journal entry, that it was by demurrer. The defendant seems to have acted at the trial on the assumption that the facts alleged in his answer remained a part of the record because he offered proof on the point originally alleged, but the same was objected to and excluded. The facts which the defendant offered to prove at the trial were, that for several years after the rendition of the judgment attempted to be revived, the plaintiff and the defendant had large dealings together and many settlements and business transactions together. This was evidence to go to the jury which they would have had the right to consider if the pleadings were in such a condition to render it admissible; but of this there is considerable uncertainty. But I think the plaintiff's pleading is also insufficient, in that it fails to allege any facts or circumstances which would excuse the long delay or which tended to continue the defendant's liability after twenty years. This was expressly held to be necessary in *Olden v. Hubbard*, *supra*. Several other questions were discussed by the appellant's counsel, but their consideration is deferred for the reason the record is not in proper condition to present them.

The judgment will be reversed and the cause remanded, and if, in view of the opinion of this court, either party shall deem it necessary to amend his pleading and re-try

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the case in the court below, no doubt that court will afford either or both of the parties an opportunity to do so. We have purposely avoided saying anything in regard to the statute of limitations for the reason that if that objection were available to the defendant, it was apparent on the face of the plaintiff's pleading, and should have been taken by demurrer.

Let the judgment be reversed.

[Filed June 21, 1890.]

**A. E. EATON, APPELLANT, v. THE OREGON RAILWAY
AND NAVIGATION COMPANY, RESPONDENT.**

CAUSES OF ACTION TO BE SEPARATELY STATED—WHEN DEFECT CURED.—While, under the Code, each cause of action must be separately stated with the relief sought so as to be intelligently distinguished, yet, where the corporate existence of the defendant and the ownership of its road is not only made certain by reference but the answer supplies the defect in each count; *Add*, that, in the absence of a demurrer specifying the objection after the evidence was submitted, the objection comes too late.

COMPANY OWNING OR OPERATING UNFENCED ROAD LIABLE FOR STOCK KILLED.—The purpose of our statute is to make the railroad company owning the road, or the company operating the road, liable, so that either may be sued, as the plaintiff may elect, who has sustained injury to his live stock by a moving train upon its unfenced track.

WHEN OWNER IN POSITION TO PREVENT DAMAGE TO HIS PROPERTY BY FIRE AND NEGLECTS TO DO IT, SUCH NEGLECT WILL BAR HIS RECOVERY.—If the plaintiff was in a position to have prevented any damage from fire to his property without incurring unusual danger, and made no effort to do so, it was negligence on his part and precludes his right of recovery.

APPEAL from Union county: J. A. FEE, judge.

The complaint set forth ten causes of action, eight of which grew out of the alleged injury or killing of stock belonging to the plaintiff, and the other two by reason of fires alleged to have been set out by engines belonging to the defendant. Issue was joined on each cause of action, and after the plaintiff had submitted his evidence at the trial, the defendant moved for a non-suit on the ground that there was no allegation of the corporate existence of the defendant and its ownership of the road except in the first count of the complaint. The court granted the motion as to the last nine causes of action, but refused it

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as to the first cause of action, upon which there was a trial, verdict and judgment for the plaintiff, from which the defendant appealed, and the plaintiff appealed from the judgment of non-suit, which is now to be considered.

R. Eakin and T. H. Crawford, for Appellant.

W. W. Cotton and Gilbert & Snow, for Respondent.

LORD, J., delivered the opinion of the court.

Under the Code it is required that each cause of action must be separately stated, with the relief sought, so as to be intelligently distinguished. In the first count, the averment is distinctly made of the incorporation and ownership of the road by the defendant. In the succeeding counts such averment is not repeated, but it is made certain by reference to the first count; and in the answer the incorporation, corporate existence and ownership of the railroad is directly admitted and averred. It is no doubt true that the complaint must state all the facts which constitute the cause of action embraced in it, and its defects cannot be supplied from other statements. But here the fact of the corporate existence of the defendant and its ownership of the road is not only distinctly made certain by reference, but the answer supplies the defect in the allegation, so that in the absence of a demurrer specifying the defect, after the evidence is submitted, the objection comes too late, and ought not to prevail. Defects of this character should be pointed out before answering and going to trial, otherwise, when the defects complained of are supplied by the answer, and the defendant is content to go to trial, he will be precluded from raising them.

The next objection is that the defendant company was not operating the road alleged to be owned by it which caused the alleged injuries to the plaintiff. This objection is based on the assumption that our statute declaring railroad companies liable for the value of live stock killed upon or near its unfenced track, does not apply to the

owner of the road, unless such owner was actually operating the road which caused the injury. That statute provides: "Any * * * company, or corporation, or lessee or agent thereof, owning or operating any railroad within the State, shall be liable for the value of any horses, * * * killed, and for reasonable damages for any injury to any such live stock upon or near any unfenced track of any railroad in this State whenever such killing or injury is caused by any moving train or engine or cars upon such track." Hill's Code, § 4044. We think it is plainly the purpose of this statute to make the company owning the road, and the company operating the road, liable, and that either may be sued, as the plaintiff may elect, for the injury which he may have sustained to his live stock by a moving train upon any unfenced railroad track. Its language is that "any company owning or operating" shall be liable, etc., which means, either the one or the other shall be liable, and not that the one operating the road at the time of the accident must be the owner in order to render it liable within the terms of the statute. This is the view taken in *Hindman v. Railroad Co.*, 17 Or. 619, in which THAYER, C. J., said: "Under these provisions, it would seem that a plaintiff is entitled to recover against a railroad company for the killing or injury of his stock, by alleging and proving that the company *owned or operated* the railroad, that its track was unfenced, etc.," which plainly means that it would be sufficient, under the statute, to allege and prove the facts of killing or injury of such animals, either against the company which owned or the company which operated the railroad upon its unfenced track, to entitle the plaintiff to recover. As this disposes of all the objections which we deem it necessary to consider under the motion for non-suit, it results that the judgment must be reversed as to the second, third, fourth, fifth, sixth, and seventh causes of action; and as to the eighth, ninth, and tenth, we shall proceed briefly to consider them separately.

The eighth cause of action, as set forth in the complaint,

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is based on the common law liability for negligence in killing a steer upon the track of the defendant at a point where it crosses the county road. The evidence in respect to the point where the killing occurred is, that "the stock were struck on the railroad track in the lane. The lane is a county road." The only question, then, to be considered, is, whether any negligence is shown on the part of the company. While it does not appear directly that the train which the witness saw, when it passed, killed the animals that were found dead and crippled, at the crossing, yet assuming that such was the case, it does not appear that the company or its agents omitted to exercise any precaution necessary under the circumstances. The witness does not know whether the bell was rung or the whistle was sounded, or that every precaution was not observed consistent with a due regard for the safety of the train. In such case, in the absence of any proof of negligence, the defendant's motion for non-suit was properly granted as to this cause of action.

The ninth cause of action as set forth in the complaint is based on the negligence of the defendant in allowing fire to escape from its engine whereby a growth of dry grass, which had been left uncut by the plaintiff for fall and winter feed, was burned and destroyed. The ground upon which the motion for non-suit now to be considered is based, is whether, from the plaintiff's evidence, he was guilty of contributory negligence. It appears from the testimony that the fire was burning close to the railroad track on the right of way of the defendant when the plaintiff first saw it. The plaintiff testifies: "I was on my way down to my pasture near the field. I saw a smoke start up and get larger until we got near it. We saw that the grass in my field north of the Stafford lane was on fire. I was within one-quarter of a mile of the fire, going to the Union depot, when I saw it. Just before we saw the first smoke we had noticed a train pass toward the Union depot, going east. We went on and watered my horses that were in the pasture; there

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was a large band, and it took some time; and then I went up to the depot to notify the section boss and station agent. When we got down to where the fire was, it had spread out and was burning fast. There was one hundred acres burned at that time, and it was worth \$7 an acre for fall and winter feed. I left it uncut for that purpose. I made no effort to put the fire out. It was none of my business; it was the business of the railroad company. I had two men with me at the time. The fire was burning close to the railroad track when we first saw it; it was on the right of way of the defendant." From this testimony it clearly appears that when the plaintiff first saw the fire it was burning close to the railroad track and on the right of way of the defendant, and as the train had just passed, had been set out only a short time, and had not reached the field of uncut grass which was subsequently destroyed; that at that time he had two men with him and was within a quarter of a mile of the fire, and that instead of taking some measure, or making some effort to put out the fire, he went on and watered his horses that were in the pasture, and as the band was large, he says, it took some time, but when he was done he then went to the depot, more than a mile away, to notify the section boss or the station agent. When all this was done and finally "we got down to where the fire was, it had spread out and was burning very fast; there was a hundred acres burned at that time." Considering that the fire when first seen by the plaintiff had just started, and was then only burning on the railroad track, and that the plaintiff with two men was in a short distance of it, but that before he went to water his horses it was in his field, it is clear that if he had made reasonable efforts his property could have been preserved. There is nothing in the circumstances as detailed by himself to prevent the fire spreading and saving his uncut grass which required any unusual effort or involved any great danger. His indifference is explained by his own testimony when he states: "It was none of my business; it was the business of the railroad company to put the fire

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out." This is the reason he "made no effort to put the fire out." But if he was in a position to have prevented any damage from fire, it was his business, and if he made no effort to do so, it was an act of negligence on his part which precludes a recovery. Said Breese, J.: "He saw the fire in time to arrest its progress, or at any rate to make some effort to that end, but did not choose so to do. He left the scene and was absent near one hour, and on his return the fire had reached the meadow. Common prudence requires that he should have made some effort to prevent this, and it was negligence on his part that he did not." *Railroad Co. v. McClelland*, 42 Ill. 359. "Even if the appellant were guilty of negligence," said Walker, J., "the appellees are bound to use reasonable efforts to preserve their property. When the fire escaped they had no right to fold their hands and permit their property to be consumed without an effort for its preservation, and then claim the right to recover loss from the company." *Railroad Co. v. Pindar*, 53 Ill. 451. Other cases might be cited of like import, but these are sufficient to illustrate the principles involved. His neglect to try to stop the fire when he first saw it burning, and when, with reasonable exertion, all damage from it to his property could have been avoided, with slight effort and without danger, precludes his right of recovery. The motion for non-suit was rightly sustained to this cause of action as well as the tenth and last cause of action embraced in the complaint, to which we do not deem it necessary to make further reference than to say the proof submitted by the plaintiff is insufficient to sustain it.

It follows that the judgment must be reversed as to the second, third, fourth, fifth, sixth, and seventh causes of action, but affirmed as to the eighth, ninth, and tenth causes of action, and it is so ordered.

 Points decided.

[Filed June 21, 1890.]

**A. E. EATON, RESPONDENT, v. THE OREGON RAIL-
WAY & NAVIGATION COMPANY, APPELLANT.**
APPEAL from Union county: JAS. A. FREE, judge.*W. W. Cotton and Gilbert & Snow*, for Appellant.*R. Eakin and T. H. Crawford*, for Respondent.

PER CURIAM.—The points raised and decided in the preceding cases—*Eaton v. O. R'y & N. Co.*, ante, p. 391—render it unnecessary to consider the main questions suggested by this record. In the views there expressed the instructions were not prejudicial, and the judgment must be affirmed.

[Filed July 1, 1890.]

**STATE OF OREGON, RESPONDENT, v. CHARLES OLDS,
APPELLANT.**

CRIMINAL LAW—TRIAL—DUTY OF COURT—CHANGE OF VENUE.—It is the duty of a court of justice empowered to try a party for criminal offense, in all cases to see that the party has a fair trial by an impartial jury; and where the party charged with a criminal offense applies to the court to change the place of trial, upon the ground that the inhabitants of the county where the offense is alleged to have been committed are so prejudiced against him that he cannot expect a fair and impartial trial, and the facts and circumstances of the case show that the party is not liable to obtain an impartial jury in such county, it is the duty of the court to change the place of trial to another county.

FACTS EXAMINED AND HELD THAT A CHANGE OF VENUE SHOULD HAVE BEEN ALLOWED.—Where O. was indicted in the circuit court for the county of M. for murder in the first degree, he having killed W. in said county; and after two trials O. was convicted of the crime as charged, which conviction having been set aside by the supreme court, the case was again set for trial, whereupon O. applied to the circuit court for a change of venue, upon the grounds that the inhabitants of the county of M. were so prejudiced against him that he could not expect to obtain a fair trial, and showed in his application that the leading newspapers of said county of M. had published full accounts of the former trial, and represented O. as guilty of the offense charged, and one of them contained an article animadverting upon the majority of the members of the appellate court for having set aside the conviction; and it appeared upon the third trial that a jury was only obtained from three hundred names drawn, two of them having been taken after O. had exhausted his peremptory challenges; seven of them stated upon their examination for cause that they had formed and expressed an opinion as to the guilt or innocence of O., and one of them was allowed to sit in the case; *held*, that the court should have ordered a change of the place of trial.

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HOMICIDE—JUSTIFICATION.—To justify one person in taking the life of another, it must appear that it was done to prevent the commission of a felony by the latter upon the former.

HOMICIDE—MURDER IN THE FIRST DEGREE.—The killing, however, if not justifiable, is not murder in the first degree, unless done purposely and of deliberate and premeditated malice, or in the commission or attempt to commit rape, arson, robbery or burglary; and there must be some other evidence than the mere proof of killing to constitute it murder in the first degree, unless effected in the commission or attempt to commit a felony; and the deliberation and premeditation necessary in such a case must be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood and not hastily upon the occasion. As in the opinion of a majority of the members of the court, there was no proof in the case of the character above mentioned; *held*, that the evidence was not sufficient to warrant a conviction of murder in the first degree; *held, further*, that where the evidence in a case of murder is not sufficient to establish the highest grade of the offense charged, it is the duty of the trial court of its own motion to instruct the jury to that effect; and where it affirmatively appears upon the appeal to this court from a judgment of conviction of murder in the first degree that the evidence was not sufficient to justify it, it is its duty to reverse the judgment.

CRIMINAL LAW—TRIAL—EVIDENCE.—The admission of incompetent testimony in a criminal trial prejudicial to the accused, and which is admitted against his objection, is such an error as will require the appellate court to reverse the conviction obtained therein. Where, in a trial for murder in the first degree, charged to have been committed by the accused shooting the deceased at a certain place, the State, in order to show that the accused was waiting at the place immediately before the shooting was done, introduced a witness who testified that as he passed the place he saw a heavy-set man standing there but did not recognize him as the accused, nor was he able to describe the man so that he could be identified as the accused; *held*, that the statement of the witness to a friend of his, a short time thereafter, upon his hearing that the accused had shot deceased, to the effect that he believed that the accused was standing at the place when he passed by, was not competent evidence; *held, further*, that the admission of such statement as evidence under the particular circumstances of the case, against the objection of the accused, was error, and highly prejudicial to him.

APPEAL from Multnomah county: L. B. STEARNS, judge.

This is an appeal from a second conviction of the appellant for the crime of murder in the first degree; the first conviction having been reversed by this court at the October term, 1889. *State v. Olds*, 18 Or. 440, S. C. Rep. 940. The cause being remanded to the circuit court, the district attorney moved to again set it for trial; whereupon it was so set for February 12, 1890. The order setting it for trial at this time recites that it was done by consent of the parties; but on the seventh day of February preceding the date at which the cause was set the appellant filed a motion to change the place of trial of the action, upon the grounds that the judge of the circuit court presiding in department No. 2, and the inhabitants

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of Multnomah county, respectively, were so prejudiced against him that he could not expect an impartial trial either by said judge or in the county. The motion was based upon the affidavit of the appellant, which stated, in substance, that on the thirteenth day of May, 1889, the indictment was returned by the grand jury charging him with having, on the tenth of the same month, deliberately and with premeditated malice killed Emil Weber; that he was arrested on the day of the homicide, and had ever since been kept in close confinement with no opportunity to prepare for trial; but that the court, notwithstanding his objections, set his case for trial for the twentieth day of June, 1889, on which day he was tried, and the trial resulted in a disagreement of the jury; that the court immediately thereupon, against the objections of appellant, again set the case to be tried July 9, 1889, but it was subsequently continued until the sixteenth day of that month, at which time the trial was had; that on the thirty-first day of July, 1889, appellant made and filed an affidavit, with several extracts from the *Daily Oregonian* and *Evening Telegram* attached thereto as exhibits, in support of it, a motion to postpone the trial until the next term of court; that from said affidavit and exhibits the court was fully advised that the public mind was greatly influenced and prejudiced against him, and could not fail to have known that he could not have a fair and impartial trial at that term of court; that notwithstanding said facts the court overruled the motion and forced him to trial, in consequence of which a verdict of guilty was found against him. He further said that he believed that the said judge was so influenced by the course pursued by said newspapers, and so prejudiced against him, that he could not expect an impartial trial in a court over which he presided; that he believed that the judge was in great fear and dread of attacks from said newspapers if he failed to pursue a course which would meet with their approval; and that such dread and fear would prevent him from pursuing an independent course and give appellant a

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fair trial. A further ground for his belief that the judge was prejudiced was, that when he was called into court to have his case set for trial the last time, one of the counsel on his former trial notified the court that the senior counsel who had conducted his former defense was confined to his room by sickness at Tacoma; that another of his counsel who had assisted at the argument of the case in the supreme court had gone to San Francisco, and that the day of his return was uncertain; that another lawyer who had been negotiated with to assist in the defense was confined at home by sickness, and it was impossible to know when he would be able to attend court. The court, however, fixed said twelfth day of February for the trial, although the district attorney expressed his willingness that it should be fixed for a week later, the judge saying that in view of the business on the docket he would not change the time; that, as appellant was informed and believed, there was business on the docket which would have occupied the whole time of the court during the week asked for, and he believed that the only reason why the court refused to allow another week for his counsel to prepare his case was that he was influenced by his prejudice against appellant and his fear of attack by the newspapers; that he believed that the inhabitants of the county were so prejudiced against him that he could not expect a fair trial therein; that in addition to the causes stated in his affidavit and the exhibits thereto attached, were the following: After his second trial and the judgment was entered upon the verdict of the jury, that he caused the case to be appealed to the supreme court, where the judgment was reversed, and after it was known to the *Daily Oregonian*, that paper attacked the decision with great bitterness, and the majority of the court which rendered it; which attack was published therein on the seventeenth day of December, 1889, a copy of which is attached to the affidavit and made a part of it; that the effect of the publication was, as he verily believed, to still further prejudice the inhabitants of the county against

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him; to increase the fear of the judge of the court that he would be likewise attacked if he should not please the said newspapers with his action; that the *Evening Telegram*, under date of February 4, 1890, caused to be published in its columns an article relating to his possible application for a change of place of trial, for the purpose, as he verily believed, of forestalling, as far as possible, any action he might think necessary to take in the matter, and, if possible, prevent the court from granting such application, if made, and also for still further influencing and prejudicing the inhabitants of the county against him. A copy of this article was also attached to and made a part of said affidavit.

The attorney for the State endeavored to controvert the said affidavit by the affidavits of a number of persons, stating that they were citizens of Multnomah county, and were acquainted with many other citizens thereof, and believed that the accused could have a fair and impartial trial therein; that a jury could be selected from the body of the county who would not in any manner be prejudiced against him. The said motion, at the request of the said judge of department No. 2, was heard before the judge of said court who presides in department No. 1 thereof, and the same was denied. When the case came on for trial a jury was selected from three hundred names drawn, two of them having been taken after the accused had exhausted all his peremptory challenges. Seven of the jurors drawn stated upon their examination for cause that they had formed and expressed an opinion as to the guilt or innocence of the accused, and one of these was allowed to sit in the case.

Upon the trial the following testimony was given regarding the circumstances of the alleged crime: John Bose testified, in substance: That he was in the employ of Weber; that on the day of the homicide, the tenth day of May, 1889, he started with the deceased to go to their boarding house on Alder street in the city of Portland; that they left the barber shop about 1 o'clock P. M., went

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west on Alder street, and at the corner of Second and Alder met Mrs. Weber and Miss Walters with a gentleman friend; that they stopped and talked with them five or ten minutes, and then went on; on the northeast corner of Third and Alder streets they met Mr. Gullixon, and Weber ordered a mat from him to put in front of the boot-black stand in the barber shop. They then started across Third street, and when they got within fifteen or twenty feet of the edge of the sidewalk, on the west side of Third street, they looked up and noticed the accused standing at the water-plug at the northwest corner of Third and Alder streets; that as soon as they noticed him he said: "Mr. Weber, I hear you have been round town looking for me?" In reply to which, Mr. Weber said: "You son of a bitch, what do you want of me?" and he hardly had the words out of his mouth when Mr. Olds commenced shooting. The first shot missed Weber, the second one struck him in the back of the neck, and as he was falling another bullet struck him; and after he was down Olds walked up and shot him at another place, and then stooped over and shot him in the back of the head. Five shots were fired. At the time Olds accosted Weber he was standing up against the water-plug, and had his right-hand in his front pants pocket, in which he had the pistol. That when the first shot was fired, Weber threw up his right arm and started to go round the corner of the sidewalk. There was an interval between the first and second shots fired. Witness supposed that a cartridge missed fire or something similar to that. After Olds fired the last shot he walked around Weber's body, looked at witness, and then said: "Now, you son of a bitch, I suppose you will go round looking for me," and then walked down Third street. The witness further stated that Olds was about two feet from Weber when he shot him in the neck; and upon his cross-examination, stated that when Olds spoke to Weber the latter reached his left hand up to his pants pocket; that he was probably five, six or seven feet from him at the time he

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answered Olds; that he was putting his hand in his pocket while he was addressing Olds.

H. F. Gullixson testified, in substance: That he saw Weber at the time referred to by witness Bose; that he had got down a short distance from the lower crossing of Third and Alder streets and turned around and looked toward the upper corner of said streets and saw a man fall headlong on his face with his hands out. He fell in a line with the curb. As he fell witness saw another man standing over him with a pistol, shooting. Between the first and second shots there was probably a little more time elapsed than between the other three shots. Witness only saw when the man fell. Did not see the first shot fired. Being on his wagon and driving away, his attention was called from hearing the report of the first shot. He indicated the manner of the shooting by snapping his fingers for the period of time of about five seconds. He identified the accused as being the man who did the shooting and Weber the man who was shot. He stated that after accused shot Weber he turned around and walked upon the sidewalk with his pistol in his hand, and put it into his pocket, and then took his handkerchief out, took his hat off, wiped the lining and his brow, put the hat on and his handkerchief in his pocket and started to walk down the upper side of Third street between Alder and Washington. Witness said he did not notice that he was excited, "except you might say so from perspiring." The witness further testified that he saw the accused as he was walking to the jail with Mr. Hacheney; that he walked past witness' store on the opposite side of the street; that he did not appear to be excited; that he walked along very quietly with Mr. Hacheney.

M. G. Griffin testified, in substance: That he resided in Portland and was a real estate investment agent; that about one o'clock in the afternoon of the tenth day of May, 1889, he was on the east side of Third street about eighty feet from the corner of Alder, and from ninety to one hundred feet from the water-plug in question; that he

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heard a shot which attracted his attention; that before he could locate it two or three shots were fired. He then saw the accused, when the fourth shot was fired, "stoop over a prostrate form and very deliberately shoot into the body, the back of which was toward him. He shot again; then the accused looked at the body very calmly, walked a step or two, threw back a part of his coat, put in his revolver, then put his hand behind his back and took out a handkerchief (as calmly as I am doing it now), took off his hat, wiped his brow, wiped his hat, and at the same time he walked around the body and looked at it a couple of times; then he put on his hat and walked north on Third street very slowly; then he commenced to quicken his step, and several spectators gathered and said this man ought not to be allowed to go"; that witness ran across the street and put his hand on the shoulder of the accused and told him he thought he ought to go to the city jail; then Mr. Hacheney said he would take him down, and the accused said he would go with him.

Milton Weidler testified, in substance: That he was secretary of the Portland fire department, and that was his business and occupation in May last; that he was not acquainted with the defendant Charles Olds, or Sandy Olds; that he had seen him; that he saw him about four or five days before the shooting of Weber in front of the Magnolia restaurant; that as witness was going into a restaurant there were four or five persons standing just outside of the entrance, and as witness came up one party mentioned Olds' name; that he did not know whether it was an introduction or not, and in looking around he saw the accused; that that was all. The witness was then asked: If about one o'clock on May 10th last he saw the accused, and where it was he saw him? To which the witness answered: "No, sir; I won't swear that I saw him."

Witness was then asked the following question: "State if you saw any one upon that day at the corner of Alder and Third?" The question was objected to by defendant's

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counsel unless there was testimony tending to show and identify the defendant; whereupon the counsel for the State said: "We will bring it directly home by this very witness." The court thereupon overruled this objection, and the defendant excepted to the ruling. The witness then answered; "I left the Magnolia restaurant about one o'clock, * * * and passed down Alder street, and there was a man standing in close proximity to that fire-plug there. I paid no particular attention to him and passed on, and I noticed that he was a heavy-set man, and his back was toward me as I passed on down, and I went on down Third street to Washington." Witness further said that he "did not particularly observe the color of the person's hair and his clothing; merely noticed that there was a heavy-set man standing there"; that was all he noticed; that he passed on down Washington street on the north side of it, and that when about half way between Third and Second, a boy came running along, and the shooting was spoken of; the boy said Olds shot Weber. The defendant objected to what the boy said. The witness then went on to say what occurred to him, and an objection was interposed on the part of the defendant. The counsel for the State then asked the following question: "Just state that as to what party was standing there?" which was objected to by defendant. Whereupon the court said: "I think he may state it"; to which the defendant excepted. Counsel for defendant then objected to the witness stating what occurred to him at the time; to which the court said: "Very well; answer." Defendant excepted. The witness then said: "Shall I answer what I said?" to which the court replied: "Yes; answer the question." The witness then proceeded to say: "The boy said Olds shot"—when an objection was interposed on the part of the defendant as to what the boy said; whereupon the court remarked as follows: "What occurred to you is what you were to state; what you said at that time." Counsel for the defendant objected to what the witness said at that time for the reason that it was incompetent, immaterial

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and hearsay. The court overruled the objection, the defendant excepted, and the witness answered as follows: "I said to this friend of mine, 'I believe that Olds was standing on the corner when I passed by.'" The witness further stated that he did not know anything that caused him to believe it. He was then asked by the counsel for the State what his impression was as to the person that was standing there at the time; which question was objected to by the defendant's counsel as incompetent. The court overruled the objection, and the defendant excepted to the ruling. The witness then answered that he merely coupled the fact of a man standing there with the tragedy occurring a few minutes afterwards; that he coupled the two as any one would, and merely said that he believed that Olds was standing there as he came down; that he did not pay any particular attention to the man as he stood there; that witness was merely passing by and saw the figure was there. He was a heavy-set man, but "I would not be willing to swear that I noticed his complexion."

Blanche Martin testified, in substance: That she had been residing in the city since 1881; that she remembered the circumstances of the shooting on the tenth of May, 1889; that she was at the time on Third street, between Washington and Alder; was coming up Third street; that she heard a shot, but did not know it was a pistol shot, nor pay any attention to it; then saw the confusion around; looked up and saw a man just fall, and then saw another stoop over him and fire three shots when he was already down lying on his face; that there were three shots fired into his body; that after he had done that he stepped on to the sidewalk, took his hat off, wiped his brow and his hat and then walked down Third street. Would not swear that the accused was the man she saw at the time.

C. E. Hoxie testified, in substance: That he was police officer of the city on the tenth day of May, 1889, and was acquainted with the accused; that he had a conversation with him on the way from the police station to the county jail; that when we got nearly up to the corner of Third

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and Alder, he said: "This is the place. I was walking up Third street with my hands in my pocket and my head down, and when I got near to the corner I looked and saw Weber on the crossing of Third street. When I saw him I said: 'Mr. Weber, I understand you have been looking for me?' And Weber said: 'What do you want of me?' Weber went down with his hand toward his pocket, and I never waited. I pulled my gun and began shooting. The first shot I missed him. Weber put up his arm and I reached over and shot him in the neck and he fell, and I shot him again."

J. F. Clark, a book-keeper residing in Portland, testified, in substance: That, on the tenth day of May, 1889, about one o'clock p. m., while on his way from his house to the store, after he got past Third street about fifty feet he heard the quick crack of pistol shots; that he turned around, and just as he turned saw the accused step off the sidewalk and fire two shots into the body of another man. The body was lying close to the curb, the feet toward the curb and the face lying in the dust toward Alder street. The accused, after he fired those shots, walked right around the head of the body, took his handkerchief out and wiped his brow, also wiped his hat, and then placed it on his head and walked off down Third street. That it looked to him, the distance he was away, as though he did it pretty cool.

Mrs. Weber, wife of the deceased, testified: That she and her husband boarded at the Magnolia restaurant on Alder street; that they had been boarding there about six months; that she knew the accused by sight, and that he knew they were boarding there; that he had seen them going in and out of there frequently. Witness also testified that her husband's right hand was crippled, and that when walking in the street he most always carried it in his pocket; that she had been married to deceased about two years; that he had a former wife, but she had obtained a divorce from him.

M. C. Sullivan testified, in substance: That he was a

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detective by occupation and resided in Portland; that he had business at Freeborn's store, between Washington and Alder streets on the west side of Third; that he was leaving the store when he saw Olds, just before the homicide; that he (Olds) was moving toward the corner very slowly, perhaps fifty feet from the corner, perhaps further; that he had his face turned like as though he was looking toward Second street, going along in a very slow gait; that witness walked down on Washington street, when he heard the shot; that the distance he walked from the time he saw Olds until he heard the shot was about two hundred feet; that he has walked it since in a minute and a half; that he was in a hurry after leaving Freeborn's and walked pretty fast.

Charles Sliter was called as a witness on the part of the State and testified, in substance: That he was one of the proprietors of the Crystal Palace saloon; that Olds' business was that of running the Olympia club-rooms up stairs over the Palace saloon; that the business belonged to an association of which Olds was the principal party; that witness was the lessee of the building and leased the club-rooms to the association, the managers of which were Olds and Frank Lynch; that witness' saloon furnished the liquor for the association's rooms; that on the morning of the shooting, somewhere in the neighborhood of eleven o'clock, Weber and a Mr. Drugan came to the Palace saloon and had a drink. 'Mr. Weber said to me: 'I suppose you heard about the trouble I had the other day.' I said, 'Yes.' 'Well,' he says, 'I broke some glassware and done other damage here; whatever it is I will pay for it.' I told him there was no pay so far as that was concerned; it was all right; the trouble in the house I cared more about than anything else. 'Well,' he says, 'I came up to day—this morning; I want to talk to you about this red-headed son of a bitch up stairs. I know he is running a game up there, and he shall not do business in the town while I am in it.' And with that I was busy and stopped talking, and our conversation went on at intervals, broken

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like, because people were coming in and out all the time, and I was behind the bar and had to do the work. And finally Mr. Weber said to me he would come over again when I was at leisure. 'Anyway,' said he, 'I am going to have him vagged to day, and I will see what I can do with him.' So somebody else came in, and he stepped over to a writing desk in the corner of the room. Mr. Drugan was with him. They carried on a conversation. I was quite busy at that time, and Mr. Weber called out to me and said: 'I see you are busy; I will see you again after awhile'; and he went out." The witness then said that just about noon he went out of the saloon to go to his up-town place. The witness continued his testimony as follows: "I went out and was looking for a street car, and just as I stepped out of the front door Mr. Olds came up, and I said, 'good morning,' and he said, 'good morning;' and he says to me, 'I understand Weber has been around again.' I says, 'Yes; he was here and he is pretty hot, and he talks pretty bad'; and I told him about the conversation we had, and told him also about his having him vagged. I then told Mr. Olds that I thought the best thing he could do was to keep quiet or to go away awhile; go away somewhere until the thing quieted down; and it probably could be settled satisfactorily in some way. Mr. Olds says: 'Well, I will tell you; if you think I am any detriment to the house, I would rather go away.' 'Well,' I says, 'that is my judgment; I think you had better go away for awhile,' and at that the car came along and I jumped on the car, and that was our last conversation." The witness also testified that Weber had been at the Crystal Palace saloon several times before this inquiring for Olds and "looking" for him, and that this was what Olds referred to when he said he understood Weber had been there again; that Weber threatened to inform on the house; said that he (Olds) should not do any business while he (Weber) was in town; that he would inform against the house and against Olds for carrying on a gambling game; that he thought to that extent Olds was a detriment to the house; that he did

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not want any trouble there; that the business was carried on by the Olympic association; that it was an incorporated institution. The witness also testified, against the objection of counsel for the accused, that he (witness) was the responsible man in the association.

The State thereupon rested.

The accused did not deny the killing, but claimed and attempted to prove that it was done in self-defense.

E. A. Post, a witness for the defense, testified, in substance: That he resided in Portland; that he had no occupation at present; that he had just left the hotel business; was one of the proprietors of the Gilman House; was acquainted with Weber; that the latter had a place of business fifty feet from the Gilman House in 1883 or 1884; that he always considered him a person disposed to be quarrelsome, vicious, irritable and dangerous; that he (witness) used to drive a soda wagon and was in his (Weber's) place every morning; knew there was a disturbance there several times, and they all seemed to blame Mr. Weber for it. His reputation was that of a person who would shoot; had seen him carry a pistol; seen him take a pistol out of his drawer and put it in his pocket when he went off watch (meaning when Weber left his saloon for any length of time); would not swear that it was the pistol shown him in court, but stated that it was one like that.

C. W. Holsapple testified, in substance: That he was a police officer of the city and acquainted with Weber in his life-time; that he had the reputation of being very quarrelsome and disagreeable to get along with, and that he would shoot. Counsel for the State, upon the cross-examination of the witness, showed that the latter had arrested Weber several times for gambling, and attempted to show that the persons whom he had heard speaking concerning Weber's character had done so from the fact that Weber claimed that the police officers should not interfere with him in carrying on a gambling business while they permitted others to do so; and did show that upon one

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occasion when he arrested Weber for gambling that Weber told him that if he would go with him to a certain place he would show him where there was gambling, and that the witness told Weber that one at a time was all he could handle; that after he took him down to the station that he would see if there was gambling going on at other places, but did not arrest anyone then, not at that particular time.

William Summers testified, in substance: That he was acquainted with Weber; knew him in the winter of 1881; first became acquainted with him in Laramie City, Wyoming Territory; used to be very intimate with him; was in his employ both in Wyoming Territory and Portland; in the latter place about nine months and in the former place about three months; that Weber was engaged in the saloon and gambling business; that his reputation was bad; that he was believed among those with whom he associated, and understood generally to be one who would shoot; that he and Olds were not on friendly terms; that he heard him say at the corner of First and Alder streets, Portland, more than a year ago, something about a "big son of a bitch: some people were bigger sons of bitches than others—back-cappers"; that he (witness) turned around and said, "What do you mean"? and Weber said, "I mean that big red-headed son of a bitch standing there," referring to Olds; that Olds turned and walked around the corner of the sidewalk out of the way; that Weber was in the habit of carrying a pistol in front of him, inside his pants; that the pistol in court is the same kind of a pistol he used to carry; that he had seen him handle it with both his right and left hand; that his right hand was drawn up and he could not open it to the full extent; that he had seen him take a gun in this hand (referring to a pistol); that Weber told him that he had braked on the Union Pacific railroad between Laramie City and Green River, and between Laramie and Rawlins, Wyoming Territory; that his reputation there was bad. Witness said, on his cross-examination, that he came to this country with Weber, and that the latter paid his way out here; that he

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was a pretty good man when he came here; that, as a man to work for, he so regarded him; that he never had any trouble with him but once, and that settled it between us two; that he could not say that he testified on the former trial that Weber's bad reputation arose out of an order that gambling should not be allowed on the first floor, and of his declaration that if gambling was not allowed on the first floor it should not be allowed on any floor; that his reputation became worse after that time than it was before; but that was not the first that started it; that Weber was interested with Jacob Weber, Paul Furay, Isaac Gratton, and, he thought, James Furay, in the Brunswick billiard hall—a gambling house and saloon; that witness was working there at the time, could not say that his reputation among those people was good; that he had been closed up in his gambling house previous to that time; that his gambling house on the corner of First and Alder had been closed by the authorities, and after that he went into business with Jacob Weber, Gratton, Furay and Vernon; that he had heard men in his profession say that his reputation was bad; but could not say that it was any worse after he left the Brunswick billiard hall than it was previous to that time; that he was considered by men in his profession a dangerous man; that he would use a gun, pistol, knife, poker, or anything else; that everybody at the Brunswick billiard hall who was interested in the house had no love for him; that there was more or less rivalry between him and them; they were engaged in the same kind of business; that witness was “now” a saloon man at Aberdeen, W. T.

Joseph Day testified, substantially: That he was a police officer in Portland, and had been such since the first of August, 1888, and had been such officer at a time previous to that; that he knew Weber's general reputation for being a violent, vicious and dangerous person; that it was bad—a quarrelsome man; that he knew Olds; that he had a conversation with Weber about two days before the shooting occurred. “I saw him as I was going down Third street. He was walking up the street. I looked at

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him and says, 'You look from the looks of your eye as if you had been having a scrape.' He says, 'Yes; the son of a bitch that did that—I will make him jump off the wharf, or the dock'; I don't remember which words. I says, 'Weber, if I were you I would not have any trouble about anything like that; it won't do any good to make any talk like that.' He says, 'I will kill the son of a bitch on sight.' I says, 'Weber, you hadn't ought to talk that way. You know I am a police officer, and that is not very good talk for you to make, because if this man should hear it he might not give you an opportunity to do that.' 'Well,' he said, 'it don't make any difference to me whether he does or not,' and I walked away and went down to the station."

J. F. Watson testified, in substance: That he was a captain in the police force, and had been a police officer for twelve or fourteen years; that Weber's reputation was bad, and that Olds' reputation in the community as a peaceable, quiet citizen. was good.

J. M. Gilman testified, in substance: That he lived in Portland; was a steamboat man, and owned the Gilman House; that he knew Weber, and that his reputation was bad.

John Minto testified, in substance: That he resided in Portland, and that he saw the fight which occurred between Weber and Olds a few days before the homicide; that he was standing on the sidewalk in front of the Crystal Palace saloon. "Olds was standing on the edge of the platform in front of the saloon, with his face towards the street, leaning on a small cane. Weber passed directly behind Olds and looked into the saloon, and turned around and came to Olds from behind, ran against him and pushed him off the platform on to the sidewalk. Olds dropped the cane and hit Weber in the face; hit him two or three times. After the first lick Weber threw up his hands to his face, and Olds hit him three or four times about that time. They scuffled a short time. Weber seemed to stoop down and got both hands up to his face and started for the saloon door. Olds was on the back of his neck and hit

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him once or twice in the neck and back of the head, but both went against the door, pushed it open and went inside. As soon as the doors were open Weber started to the bar, evidently to get hold of tumblers, Olds still having hold of him; but he got to the counter and got hold of two or three tumblers and stepped back. Olds let go of him, turned, almost facing him, and said: 'Throw it, you son of a bitch; you don't dare to throw it.' That was the first word spoken from the time they commenced. Weber threw one of the tumblers at Olds and missed him, and Olds hit him again; and as Weber stooped to pick up one of the tumblers he had dropped after he threw the first one, Olds again hit him. By this time they had clinched; were scuffling and went over the left side against the wall. The bar tender then interfered and said: 'Don't knock those pictures off the wall.' They both seemed to be pretty well out of breath, and separated. No one interfered to any great extent before they were separated. Neither of them was knocked down. Weber threw the glass with his left-hand. Witness called his attention to it in talking to him afterwards; told him he did not know he was left-handed before." Witness further stated that he was a real estate man; that he had formerly been sheriff of Marion county.

Frank Summers, bar tender at the Gilman House, testified, in substance: That about a year before he heard Weber, in front of the Brunswick billiard hall, about the time he was arrested, say to Olds: "You dirty son of a bitch, I have got it in for you; you are the cause of this." Olds said to him, "Keep away from me; I do not want anything at all to do with you." "And he started to walk away from Weber, and the latter followed him up and kept talking to him in that way." Witness also testified that Weber's reputation was not very good; that he had heard that he would use a gun; that Olds' reputation was good.

Paul Furay testified that he resided in Portland; that he had been bar tender for Weber; that he was acquainted

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with his general reputation as a vicious, quarrelsome, dangerous person, and that it was bad; that after the fight they had at the Crystal Palace saloon he told witness up at his room that it was not over yet; that he would be fixed for him the next time he saw him, and identified the pistol in court as the same one Weber used to carry.

Albert Richster testified that he was a bar keeper; had been living in Portland ten years; knew Weber in his lifetime and was acquainted with Olds; that on and just prior to the tenth day of May, 1889, he was at the Crystal Palace saloon; that he recollected the fight which occurred between Olds and Weber in the early part of May at the saloon, but was not present at the time; that Weber was there about half a past five o'clock of that day; that he came in and asked how many glasses were broken, and that he (witness) referred him to Mr. Watson; that he then inquired where Olds was, referring to him in his usual style of designating him, and said, "If he is up stairs, call him down; I will make him leave town; I will do him up; I will make him jump into the river." That that was the day before the shooting. That he came back that evening about eleven o'clock and asked witness the same question again; said he could not work in this town; that witness communicated to Olds that Weber had been looking for him and told him what Weber had said; that he had never spoken six words to Weber, but had always heard that his general reputation was bad; that Olds' reputation as a quiet, peaceable person was good. That evening when Olds came down from up stairs he waited until I closed up the saloon; it was one o'clock; that Frank Lynch and he (witness) walked home together and that Olds was with them and on the inside; they walked up Washington street to East Park, where they left him (Olds), and he went up East Park; that Lynch told Olds that he had better get in the center; that Weber might be around one of "these corners," and that Olds stepped between Lynch and witness and walked up Washington street.

Edward Holman, the undertaker, who took charge of

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Weber's body, testified that he saw a pistol after they had raised the body from the sidewalk; it was lying down on the sidewalk; that in raising the body up he thought that the pistol was lying right underneath him; that he put a tag on it and gave it to Sheriff Kelly; could not tell whether the pistol was lying there or dropped down there when the body was picked up; thought the pistol was very similar to the one in court; that it was loaded. Witness also stated that there was a brass weight found there at the place about the size of an iron weight for scales marked 200 pounds.

Penumbra Kelly, sheriff of the county, testified that the pistol in court was the same one got from Edward Holman; that it was loaded at the time he received it.

David Campbell testified that he resided in Portland, and on the tenth day of May, 1889, was there; that he was driver in the fire department, and acquainted with Olds; that at the time the shooting took place he was on Fourth and Alder exercising the horses, riding horseback; that just previous to that he had been right where the shooting was done; that he was well acquainted with Olds, but did not see him there; would have known him if he had seen him; that it was just long enough for him to go from there to Washington, up Washington to Fourth, up Fourth to Alder, before the shooting occurred; that the horses trotted all the way.

Frank E. Richardson testified, among other things, that he saw Olds coming up Third street just before the shooting, and also saw Weber and Bose crossing the street; did not pay much attention to them until he heard a shot fired; that Weber and Bose had not got off the curb on Alder street when witness first saw them; that when he looked up after the shot was fired he saw Weber standing on the crossing on west side of Third where it intersects Alder; that he went over and helped pick him up after he was shot; that he saw a brass stopper or plug in the street under him when he lifted him up; that he saw a pistol; Mr. Holman picked it up; that he was put in jail as a witness

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for the State, and was held until the trial of Olds began; that he was not called on either trial as a witness for the State.

M. J. Kochman testified that he saw Weber and Olds standing together and saw Weber make a motion for his hind pocket. Question by defendant's counsel: "What pocket?" Answer: "For his hind pocket, or for his pocket; and immediately after that heard a shot fired, and almost immediately another one, and then saw Weber fall, and in a very few seconds after that Olds fired three more shots in his back over him."

S. B. Parrish, chief of police of the city of Portland testified that soon after Weber was killed, he was at the place of the killing; that he saw the pistol picked up from the ground; that when they turned Weber over it was under him, and was picked up then; that he recognized the pistol in court as the one picked up.

Several other witnesses, including the accused himself, gave evidence on the part of the defense; but in the main it was only cumulative of that which was already given.

The accused, however, in his testimony made a full statement of his antecedents, of his relations with Weber and of the circumstances relating to the killing.

The State also called three or four witnesses to rebut the evidence of the defense regarding Weber's reputation as to his being vicious and quarrelsome; also sought to impeach some of the witnesses for the accused by attempting to show that they had testified differently from what they did on the former trial. Several of the witnesses for the defendant were gamblers, and the counsel for the State proved by them upon their cross-examination that the gambling fraternity of Portland and other places had raised a fund to assist the accused in his defense to the charge against him; and the district attorney, in his closing address to the jury, made statements concerning the testimony so elicited and drew inferences therefrom which the counsel for the defendant claimed were unwarranted, and which operated prejudicially to the defendant.

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After the testimony was closed the trial court charged the jury generally as to the law of the case, to which no exceptions were taken that are relied upon by the defendant's counsel. Said counsel, however, saved exceptions to the refusal of the court to give two instructions requested by them, and on which they do rely. The instructions so requested and refused are as follows: (1) "It is your duty to reconcile the evidence in this case with the defendant's innocence if you can consistently do so." (2) "You cannot find a verdict against the defendant unless you find that his guilt is in all things consistent with the evidence in the case, and wholly inconsistent with any reasonable hypothesis of his innocence."

The jury returned the following verdict: "We, the jury, find the defendant Charles Olds guilty of murder in the first degree, as charged in the indictment."

The counsel for the defendant thereupon moved the court to set aside the said verdict upon several grounds specified in the motion filed. The court overruled the said motion, and adjudged that the defendant be hanged; which is the judgment appealed from.

C. B. Bellinger, for Appellant.

There is no evidence tending to prove deliberation, premeditation or malice. The State relies upon the alleged fact of a lying in wait as authorizing a presumption of deliberation and premeditation. The "lying in wait" is inferred from the alleged fact that the defendant was at the place of the homicide on the street shortly prior to the meeting; and the fact that he was so there is inferred from the doubtful circumstances that he was seen walking slowly in the direction of the place of the homicide and fifty feet or further distant by a person who met him and who was himself walking rapidly and who had only time to walk two hundred feet after seeing the defendant before he heard the shooting.

The fact of lying in wait relied upon to create a presumption of deliberate and premeditated malice cannot itself be

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presumed. It must be proved as a fact. There is no such thing as a presumption from a presumption. A presumption is an inference of fact from a fact *proved*. "A presumption of fact is a logical argument from a fact to a fact, or, it is an argument which infers a fact otherwise doubtful from a fact which is proved. Hence a presumption of fact to be valid must rest on a fact in proof." Wharton's Criminal Ev., § 707. No inference of fact or of law is reliably drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove facts, *the circumstances must be proved and not themselves presumed*. *Ibid*, note 2. "A presumption which the jury is to make is not a circumstance in proof, and it is not therefore a legitimate foundation for a presumption. It, the presumption, must rest on established facts." *Douglas v. Mitchell's Executors*, 35 Penn. St. 440; *King v. Burdett*, 4 Barnwell & Ald. 160. One fact cannot be presumed from another which is itself but an inference. *McAleer v. McMurray*, 58 Penn. St. 126; *State v. Lee*, 17 Or. 488; *People v. Kennedy*, 32 N. Y. 145, 146; *Copeland v. State*, 7 Hump. 484.

In this case the only direct evidence as to the time the defendant was at the place of the homicide before the shooting is the testimony of the witness Richardson, who testifies that he saw the defendant and the deceased approach the corner and each other at the same time. "The foundation of a presumption is always one or more facts, *having the quality of certainty*, and in this respect distinguishable from the fact sought." Facts, therefore, from which a presumption is to arise, must have the quality of *certainty*. Burrill on Cir. Ev., page 13.

The State relies upon an inference of malice from the fact that deceased had, on the morning of the homicide, threatened to have defendant *vagged*, and to inform on the house where defendant was employed. No unfavorable inference against the defendant can be drawn from the fact of threats or injury by the deceased against him. The law will not permit a presumption that, because a

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man has been the subject of an injury done or threatened, he therefore intends a wrong. A person cannot be deprived of the presumption of innocence, which the law declares in his favor, as a penalty for the injury which another person has done him although he has himself been without fault. The statute presumption is that a person is innocent of crime or wrong. Civ. Code, § 766.

The State also relies upon the fact that after the shooting the defendant said, applying an epithet to deceased: 'I suppose you will go round town looking for me'; the contention being that this shows that defendant knew deceased had been looking for him, and that therefore there is an inference that defendant was looking for deceased. The considerations urged as to the point last stated are conclusive as to this point also.

The fact that defendant fired three shots after deceased had fallen, and the manner of the shooting, is also relied upon. The undisputed facts are shown by the State's witnesses to be that the shooting was the work of five seconds from the beginning.

This shows that the defendant was acting under great excitement, or from passion, or both. Passion and malice are inconsistent. 2 Bishop's Crim. Law, § 697. So that if an act proceeds from the one, it does not proceed from the other. Where the evidence against the verdict is overwhelming, although there is evidence to sustain it, a refusal to grant the motion is an abuse of discretion, and will be reversed on appeal. *Smith v. Athern*, 34 Cal. 506; *Dickey v. Davis*, 39 Cal. 569; *Guerro v. Ballerino*, 48 Cal. 118; *Branson v. Carruthers*, 49 Cal. 375; *Moss v. Atkinson*, 44 Cal. 16. In criminal cases a more liberal rule obtains. In such cases new trials have been constantly granted upon the ground that the verdicts were not warranted by the proof. *Dane v. The State*, 2 Hump. 442, 21 Tenn.; *Bedford v. The State*, 5 Hump. 552, 24 Tenn. Because, by the entire spirit of the criminal law, the prisoner is under a protection from the judge which a party in a civil suit is not, many deem, and it is rightly believed, that new

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trials should be awarded more freely in criminal cases than in civil, and in criminal the more freely in proportion to the gravity of the punishment. 1 Bishop on Crim. Procedure, § 1273. "It is difficult to perceive how, in a criminal case, where the interests of the State are even more injured by wrongful conviction than those of the defendant, the judicial mind can be satisfied with a verdict of guilty, which, after giving the opinion of the jury all due weight, creates still the distinct and not unreasonable apprehension that a great wrong may have been done, though there is no absolute showing that it has been, alike to both parties in the controversy." *Idem*, § 1278. The rule that an appellate court will not interfere to set aside a verdict unless it is palpably against the evidence, obtains in the largest sense in civil cases, but it is not applied in criminal cases, especially where life is at stake. *Falk v. The People*, 42 Ill. 331; *Owens v. State*, 35 Texas, 369; *Turner v. State*, 38 Ib. 169; *State v. Webb*, 41 Ib. 68; *Copeland v. State*, 7 Humph. 479; *Cochran v. State*, Ib.; *Leake v. State*, 10 Humph. 143; *State v. Tomlinson*, 11 Iowa, 401; *Sargent v. People*, 64 Ill. 327; *State v. Packwood*, 26 Mo. 340; *People v. State*, 36 Cal. 531; *Manuel v. People*, 48 Barb. 548; *State v. Miller*, 10 Minn. 313; *People v. Kohler*, 49 Mich. 324; *State v. Sopher* (Iowa) 30 N. W. Rep. 917; *People v. Mangano*, 29 Hun. 200; *Milton v. State*, 6 Neb. 183. In the two last above cases the judgments were reversed, because there was not sufficient evidence of deliberation and premeditation.

Hilliard on New Trials, Chap. 14, §§ 13, 19, 20, 21. But it is held in numerous cases, and perhaps the weight of authority is now to that effect, that *strong preponderance* of evidence against the verdict will justify a new trial." *Idem*, § 21a.

Wharton's American Criminal Law lays it down that "a conviction clearly contrary to the weight of evidence will be set aside," and probably fifty cases are cited in support of such rule. § Wharton's Criminal Law, § 8110.

The authorities are simply overwhelming, that in a

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criminal case, and more especially in a capital case, the verdict will be set aside when it is contrary to the weight of evidence. The rule that the court will not, on appeal, set aside a verdict on the ground that the evidence is not sufficient to sustain it, has been adopted in this State in civil cases. But that rule has never been recognized in a capital case, unless the remark of the judge in the case of *State v. Mackey*, 12 Or. 154, can be given such construction. The judgment in that case was reversed, however, on other grounds. In *State v. Hunsaker*, 16 Or. 497, the opinion is expressed, without deciding the point, that the power of the court, in criminal cases, to look into the evidence to see whether the verdict is justified by it or not, is beyond doubt; and in *State v. McGinnis*, 17 Or. 332, the court felt it a duty, *inasmuch as it was a capital case*, to examine the record and see whether there was any error or any ground whatever for the appeal, although the usual practice would have been to affirm the judgment, there being no brief nor appearance on appeal. In *Anderson v. The State*, 43 Conn. 514, where there was a conviction of murder in the first degree, the court directs a new trial, and says: "If we are to make a rigid application of the rules which govern the superior court in civil causes, we should doubtless advise that a new trial should be denied; but in a case where a human life is at stake, justice, as well as humanity, requires us to pause and consider before we apply those rules in all their rigor."

In *State v. Clements*, 15 Or. 243, which was not a capital case, the court say the sufficiency of the evidence to sustain the verdict will be considered on appeal when the point is presented by exception. In a capital case, however, the court will review the instructions that were given, although no exceptions were taken or saved to the rulings of the court by the defendant. *State v. Packwood*, 26 Mo. 841; *Falk v. People*, 42 Ill. 335. And so too where the defendant's counsel did not ask the court to charge the jury as they should have been charged, and the court doubted whether the question was presented so that it

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could consider it, nevertheless, the case being a capital one, the court did consider it and reversed the judgment. *State v. Johnson*, 40 Conn. 142; *People v. Levison*, 16 Cal. 99. In *People v. Bowers*, 79 Cal. 415, a very recent California case, the court reviewed the evidence in a capital case, where it was conflicting, and granted a new trial. *State v. Forsythe*, 89 Mo. 669; *Penn. R'y Co. v. Zebe*, 33 Pa. St. 818. There is no case where the court has refused to set aside a verdict clearly against the weight of evidence when life was at stake. There is no case, civil or criminal, where the court has held, without reference to the consequences, that a verdict wholly unsupported by evidence would not be reviewed on appeal. The court erred in permitting Weidler to testify against objection that he said to a friend when he heard of the homicide: "I believe Olds was standing on the corner when I passed by." The jury must have understood from the ruling of the court that such a statement was admissible to prove that Olds was on the corner some time previous to the homicide. *State v. Ching Ling*, 16 Or. 419; 18 Pacific Rep. 847. The statement was elicited to prove the main fact, and not to contradict the witness. 1 Greenleaf's Ev. § 444. *Langford v. Jones*, 18 Or. 307; 22 Pacific Rep. 1064. Weidler's statement was not voluntary, but was made in answer to a direct question by the State and after objection by defendant, which was overruled. The court erred in refusing to instruct the jury to the effect that the testimony in the case must not only be consistent with guilt, but *inconsistent with any reasonable hypothesis of innocence*. The failure to so instruct the jury is error. *People v. Dick*, 32 Cal. 213. It is important that the jury should have all the negative or counter hypotheses of which the case will reasonably admit. The consequences of overlooking a single one are sometimes deplorable. Burril on Cir. Ev., chap. 4, page 187. See also *idem*, pp. 181, 185, 187, 189; 3 Greenleaf's Ev., § 137. The general instructions furnish no proper guide as to the matters covered by the instructions requested. It is not enough that the principle of these

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instructions can be gathered from the general charge, as a matter of argument.

The statements of the district attorney in his closing argument of matters not in evidence, nor proper for their consideration, and his appeals to the prejudices of the jury, are grounds for a new trial. A portion of these matters were distinctly objected to at the time. In civil cases an argument not based on evidence, made against objection, will be ground for a new trial. *Rolfe v. Rumford*, 66 Me. 564; *Tenny v. Mulvaney*, 8 Or. 522; *Tucker v. Heniker*, 41 N. H. 318. In criminal cases the rule is more stringent. *Ferguson v. State*, 49 Ind. 33; *People v. Quick*, 58 Mich. 324; *People v. Dane*, 59 *idem*, 552; *State v. King*, 44 Mo. 238. It is the duty of the court to stop the district attorney *on its own motion* when he states facts not before the jury, or uses vituperation and abuse predicated upon alleged facts not in evidence, and calculated to create prejudice against the prisoner. *State v. Gutekunst*, 24 Kan. 252; *Jenkins v. Or. Dressing Co.*, 65 N. C. 563; *State v. Williams*, *idem*, 505; *State v. Smith*, 65 N. C. 369. A new trial was ordered where the court sustained an objection to the language, and admonished the attorney that it was improper. *Long v. State*, 56 Ind. 186; *State v. Graham*, 62 Iowa, 108. Where the court in a capital case interfered, rebuked the attorney, and instructed the jury to pay no attention to the statements, but it was impossible to say that no injury resulted to the defendant therefrom, a new trial was granted. *People v. Bowers*, 79 Cal. 415. The refusal of the court to pass upon defendant's motion for a change of venue was error. The motion was made upon affidavit, showing among other things, prejudice on the part of the judge. A matter of this kind is addressed to the judge himself. He alone knows the state of his own mind. Another judge is not qualified to pass upon the question. The trial judge is required, where the penalty may be death or a long term of imprisonment, to listen with care to the testimony presented to show his own bias or prejudice. *Emporia v.*

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Volmer, 12 Kan. 627. The challenges to seven of the jurors, for cause, should have been sustained. It is certainly not an open question that a juror who has formed and expressed an opinion has prejudiced the case, and is not a qualified juror. Wharton's *Crim. Law*, §§ 2978, 2981. The applause in the court room that followed the conclusion of the district attorney's argument is ground for a reversal, especially in view of the fact that the argument concluded with a distinct appeal to the jury to be guided by public opinion. It cannot be known that the remark made by the judge in disapproval of such applause would remove any impression that might otherwise be made to the defendant's prejudice on the minds of the jury.

Henry E. McGinn, district attorney, for the State.

The State contends first: In order for the defendant to urge as an objection on appeal the insufficiency of the evidence to justify the verdict, there must have been a request made to the lower court, a refusal by that court and a legal exception made then and there to such refusal. *State v. Clements*, 15 Or. 243; *Kearney v. Snodgrass*, 12 Or. 311. Second—Should the court be of the opinion that a different rule must prevail in capital cases, then the record furnishes abundant proof of deliberate and premeditated malice, from the fact of Weber waiting upon Sliter and requesting him to discharge Olds; from Olds waiting on the corner for Weber to come up to him; from the language used by Olds to Weber when they met; from Olds having his pistol in his front pant's pocket with his hand on it at the time of meeting; from all the circumstances of the shooting; from the language addressed to Weber's prostrate body after the killing, and from the additional circumstances that Olds was seen some moments before the killing near the place of the homicide. Testimony of M. C. Sullivan, page 51. *et seq.*; testimony of John Bose, pages 1 to 7; testimony of M. G. Griffin, pages 27 to 27½; testimony of Chas. Olds, page 182, *et seq.*; testimony of Chas. Sliter, pages 63 and 64

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The testimony of Milton Weidler of what he stated to a friend when he heard of Weber's death, was nothing more nor less than a voluntary explanation made by the witness of a statement made by him inconsistent with his sworn statement; the witness having said on oath in court, "No; I won't swear I saw Olds that day," was explaining what lead him to say out of court, "I believe I saw Olds standing on the corner when I passed by." He undoubtedly had such right with or without an impeaching question being asked of him. Wharton on Ev. § 25; Wharton on Criminal Ev. § 13; Hill's Laws, 838 and 841; *Payne v. The State*, 60 Ala. 80; *Snell v. Gregory*, 37 Mich. 500; *Langford v. Jones*, 18 Or. 307.

The question asked of jurors, "Can you disregard the opinion (derived from reading the newspapers) and try the case on the law and evidence only?" was a proper question. Section 187 of HHL's Laws; *State v. Saunders*, 14 Or. 300; *People v. Casey*, 96 N. Y. 115; 1 Thompson on Trials, § 83. No juror was taken after the defendant exhausted his peremptory challenges who was unacceptable to him. Thompson on Trials, § 120.

Judge Stearns called in Judge Shattuck to pass upon the motion for a change of venue. The charges contained in the affidavit of the defendant were of such a character that it would have been highly improper for Judge Stearns to sit and hear the motion. However, the motion contained nothing entitling the defendant to a change of venue. *People v. Williams*, 24 Cal. 33; *People v. Shuler*, 28 Cal. 495.

The request of the defendant for certain instructions and the refusal of the court to give them was not error. Wharton's Criminal Evidence, § 10; and they were repeatedly given by the court. The applause in the court room at the conclusion of the argument for the State was promptly checked by the court and a reprimand given.

The argument of the district attorney was borne out by the testimony. As to how far the district attorney may go in argument, see *Pierson v. State*, 18 Tex. App. 524; *House v. State*, 19 Tex. App. 227; *Tucker v. Henniker*, 41 N. H.

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317; *Cuss v. State*, 68 Ala. 476; *Hoyle v. State*, 109 Ind. 589; *State v. Hallen*, 75 Mo. 355; *Bulliner v. People*, 95 Ill. 894.

When no exception is taken to the remarks of counsel, such remarks cannot be urged in the supreme court for the first time as a ground of reversal. *State v. Abrams*, 11 Or. 172.

THAYER, C. J., delivered the opinion of the court.

This is the second time this case has been here; and the circumstances attending the second trial, and the whole affair, indeed, has been of such a character as to greatly embarrass the court in its determination of the questions involved. This court has no authority to review the determination of trial courts upon questions of fact where the evidence is conflicting; but it has authority to look into a case where there has been a criminal conviction, in order to ascertain whether there is evidence to support the conviction, and to ascertain whether or not the accused has had a fair trial. *State v. Hunsaker*, 16 Or. 497; *State v. Cody*, 18 Or. 506. Every person charged with a public offense whether guilty or not is entitled to a fair trial. "Because," as said by Mr. Bishop in 1 Criminal Procedure, § 10, "a guilty man has, by the law itself, a right to be acquitted, unless he can be convicted by virtue of the rules and methods which the law has itself provided." In order to insure such a trial, the constitution of this State, section 11 of article I, has provided: "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed," etc. The securing to parties accused of crime a fair trial by an impartial jury, especially in capital cases, has ever been the solicitude of the common law. Blackstone says: "It was necessary for preserving the admirable balance of our constitution to vest the executive power of the laws in the prince; and yet this power might be dangerous and destructive of that very constitution if exerted without check or control by justices of *oyer and terminer* occasionally named by the crown,

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who might then, as in France and Turkey, imprison, dispatch or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury; and that the truth of every accusation, whether preferred in the shape of indictment, information or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion. So that the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate; not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first (as doubtless all arbitrary powers well executed are the most convenient), yet let it be again remembered, that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that although begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern." 4 Black. Com. (Cooley's Ed.) 350-1.

The importance of any immunity, however, does not depend so much upon constitutional guarantees as it does upon their observance and enforcement.

The violation of the spirit of the law is as pernicious in its consequences as the violation of its letter. The right of the accused in a criminal case to a trial by jury would be of little advantage if the jury had to come from a community biased and prejudiced against him by influences

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which he was unable to countervail. Such a condition of public sentiment in a community renders it impossible, many times, to enforce a due administration of law; and it is often produced by the publication of intemperate newspaper articles. It is extremely unfortunate to the cause of justice that many of the newspapers of the country pursue the course they do with reference to cases of homicide. They seldom fail to designate the transaction as a murder, which of itself is a judgment, to the extent of newspaper jurisdiction in such matters, that the slayer is guilty of that crime without regard to the circumstances connected with it. And they usually publish not only a detailed hearsay statement of the affair, but decidedly indicate their own views regarding it. The result is, that by the time the accused is arraigned for trial, the reading portion of the community have generally formed and expressed an opinion concerning his guilt or innocence; which renders it very difficult to secure an intelligent and unbiased jury to try him by. In the case under consideration, the newspapers referred to in the appellant's petition to postpone the trial, and for a change of venue, assume, I should judge from the tenor of the articles made exhibits, to decide how the case should be disposed of. The publishers of those sheets appear to have established a tribunal of their own in which to try the accused; and in view of the extensive circulation of those papers, and their high standing as public journals, it is difficult to conceive how an impartial jury could be secured from the county where they are published, by which he could be tried, especially after two trials had already been had. Under these circumstances I cannot see why the trial court should have refused a change of venue. It is apparent, then, that a great proportion of those who would be likely to be summoned as jurors would be found to have formed and expressed an opinion as to the guilt or innocence of the accused; an opinion superinduced by the reading of the published statements of the witnesses examined on the former trial, and positive comments made by the publisher.

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There were two questions in the case to be tried—First, was the accused justified in killing Emil Weber? Second, was there sufficient evidence in the case to show that the killing was done with such deliberate and premeditated malice as to constitute murder in the first degree? That Weber had been abusive and overbearing towards Olds, had made it a point to insult him whenever an opportunity presented itself, and that the latter submitted to it meekly except when assaulted by force, is clearly shown by the testimony. What the cause of Weber's animosity was does not appear except from the statements of Olds himself. He testified that he was born at Coldwater, Michigan; that he lived there until he was twenty years of age; that he went from there to Chicago, where he traveled two years for a wholesale house; that he then went to Colorado and from there to New Mexico; that in the first place he was in the contract business; that he built or was sub-contractor of five miles of the Atchison and Topeka railroad, the New Mexico branch; that he then went into the livery business at Las Vegas, New Mexico; that from there he went to Leadville, where he had his first experience at gambling; and after various perambulations, in May of 1883 arrived in Portland, where he had since resided; that he got acquainted with Weber when he first came to Portland, the latter having come there about the same time and kept a saloon and gambling house; that the first trouble accused had with Weber was in 1885; that it was over the city election; that they had been on opposite sides; that the next day after the election accused called at Weber's place of business and was refused admission into the gambling department, and that Weber used abusive language towards him and threatened to have him vagged; that accused said to him: "Mr. Weber, you have a big gambling house here, are worth plenty of money, and I am a poor man; of course you have that privilege"; that Weber told him not to come near his house any more, and that he did not go there again while he kept it; that it was closed about a year and a half after that, and he sold or leased it to other

parties; that in 1887 or '88 Weber undertook to indict the police, and accused was subpoenaed to appear before the grand jury; that Weber found it out and came and wanted to dictate to him what he should testify to; this he refused to submit to.

The accused then proceeded to describe minutely Weber's course of conduct toward him thereafter, which was bitter and malicious in the extreme; and which no doubt led to the commission of the homicide. It is evident from the testimony in the case that Weber aspired to be a sort of leader among the class with whom he associated. He may not have been a bad man at heart, and probably was respectful and courteous to his superiors; but he had accumulated property, and like many others, became insolent and arrogant toward those whom he regarded as his inferiors in position, when they opposed his views and wishes. His vocation was calculated to make him morose and irritable. He was engaged in an irrepressible conflict with the police force, was at variance with his own fraternity, and seems to have concentrated all his spite and wrath upon Olds; and after the latter had beaten him in the fist fight in which he, himself, was clearly the aggressor, he indulged in the numerous threats of violence against him shown in the testimony. These threats may have amounted to nothing more than bravado and swagger; but with such a man as Olds, who was of a taciturn and impressible temperament, and probably remorseful on account of the false and ruinous step he had taken in life, they appeared portentous; but whether or not he was justified in taking his life under the proofs in the case, was purely a question for the jury. The right either of the State or of an individual to take human life must be sanctioned by law. In the latter case it must appear that it was done to prevent the commission of a felony upon the individual, etc., as provided in section 1730, Ann. Code. The killing, however, if not justifiable, is not murder in the first degree unless done purposely and of deliberate and premeditated malice, or in the com-

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mission or attempt to commit rape, arson, robbery or burglary; and there must be some other evidence of malice than the mere proof of killing to constitute murder in the first degree, unless effected in the commission or attempt to commit a felony; and the deliberation and premeditation necessary in such a case, must be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood and not hastily upon the occasion. This is the effect of the provisions of the statute of this State upon the subject. Section 1727, Ann. Code. It therefore devolved upon the prosecution in this case, before the jury would be warranted in finding the accused guilty of murder in the first degree,—there being no pretense that the killing was done in the commission or attempt to commit a felony,—to prove facts aside from the fact of the killing, the direct and legal tendency of which was to establish that Olds in cool blood formed a design to kill Weber and that the killing was done in pursuance thereof. It is not enough in such a case to prove circumstances from which inferences might be drawn that the design was so formed, as the statute requires that either the mode of the killing is of a character that it, of itself, proves deliberation and premeditation, such as poisoning, or that some special proof of a distinct fact be made, such as lying in wait.

It is claimed by the learned district attorney, that, from the evidence, Olds gave Weber the beating referred to; that Weber called upon Sliter and informed him that Olds could no longer continue to run the game he was then running over the Crystal Palace saloon; that Sliter informed Olds of this and requested him to leave the city for awhile; that Olds walked up Third street to the corner of Alder, where he met Weber, and the killing was done as described in the testimony for the State, and the various circumstances transpired as therein mentioned, it clearly appeared that Olds killed Weber for the reason that the latter had been hunting around town for him, and for what he had said to Sliter. The several points in the testi-

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mony which the district attorney urged at the hearing with great force, as evidence that Olds had in cool blood formed the design to kill Weber, were important matters of proof in the case, but that they were sufficient to establish that Olds was *lying in wait* to commit the homicide, cannot be maintained. "Lying in wait," according to Bouvier, is "being in ambush for the purpose of murdering another." It implies a hiding or secreting of one's self. It could hardly be claimed that a person walking on a public street in broad daylight in a populous town was lying in wait. I do not think, however, that the statute requires proof that the slayer in such case was secreted; but it requires proof of some fact, aside from the killing, showing that it was done in pursuance of a previous design. Olds having gone to the place of the homicide in the manner he did, and under the circumstances existing between himself and Weber, was no stronger proof that he went there to slay Weber than it would have been that Weber went there to kill him if he had been the slayer. It was not pretended that Olds had ever made threats against Weber or evinced any intention whatever before the time of the fatal meeting to commit violence upon him; he seemed to acquiesce in Sliter's suggestion to leave town, and never, so far as appears from the testimony, did he breathe a breath of vengeance, or even utter a word of complaint. Nor does it appear that Olds had any expectation of meeting Weber on that day; he had, in fact, been trying to avoid such meeting; upon the night previous, according to his own testimony and that of Richter, he remained up stairs until a late hour to keep clear from him; and apprehensive that the latter might be lying in wait to do him bodily injury, went a long distance towards his stopping place between Richter and Lynch. Again, if Olds had intended to murder Weber, had planned to take his life, he would not have been likely to have chosen the time and place where the killing was done to execute his purpose.

It was vehemently contended by the district attorney in

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his address to the jury, that the gamblers in Portland were at the bottom of the affair; that they had compassed the death of Weber, had employed Olds to carry out their design, and raised money to clear him and defeat the ends of justice. And he strongly intimated that the police force of the city had lent its aid and influence to further the scheme. The following extracts from the remarkable address will show the position which the district attorney occupied at the trial respecting that feature of the case:

“Men of Multnomah county: Will you stand forth and say, that because these men have sent forth the ukase that Weber should die and that the man who killed him should be defended by their money and influence and by their power and by their perjury—do you mean to say that because they have decreed the sacrifice, that you will execute their behest?” “But Weber had made an effort to quit that business and get into a business lawful and legitimate, and because he did so he was murdered,—because he attempted to stop the wheels of the chariot of King Faro and King Poker, driven by Gratton and Sliter and Olds. I don’t know what his motives were. They may have been selfish; but grant it; he was undertaking to suppress something that was against the law; and because he told them he would do it, they killed him and shot him down, and they are now rallying around the standard of their twin brothers, King Faro and King Poker.” “Is it not a shame and a disgrace that men who are on the police force of the city of Portland are able, day after day, to patrol their beats; knowing the existence of gambling in this community, knowing where it is, knowing its devotees, conversing with its devotees, walk calmly and placidly into a court of justice, raise their hands to the tribunal of God, when that same hand had formerly been raised to support and sustain the law, and take an oath that these men with whom they associated,—gamblers, all of them,—that Weber’s character was bad and Olds’ character was good. Gentlemen of the jury, I submit these facts to you; I state the facts. You draw

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your own conclusions." "Was this case to be prosecuted, or was it a case for the public prosecutor to come into court and say: 'Most grave, reverend and worthy senior Olds, my most approved good master, led by Vernon and led by Gratton and the balance of your kind, I apologize most humbly to you, I crave your humble pardon. It is true that you were armed with a deadly weapon; it is true that you stopped a man on the streets; it is true you sat on the fire-plug and waited for him; it is true that you were waiting there with your hat over your eyes, with your eye turned toward Second street waiting for him to come; it is true that Sullivan and Col. Weidler saw you there; but my dear good fellow, the police say you are a good man, and I know you must be a good man or they would not say so. Go thou and enjoy the peace of the land, King Faro and King Poker, and the balance of the kings, that go to rob manhood and womanhood of its honor and integrity.'" "I repeat again that Emil Weber, dead, is a grander character in my judgment, is a grander character in the judgment of every law-abiding citizen of this county, is a grander character to day with the hand of every one of these scoundrels against him in court, than he would be living with every one of them for him. O, for a new Christ that would enter this temple of justice to day, saying as of old, 'My house is a house of prayer, but you make it a den of thieves.' *That is what they would do with this court-house; they have commenced to undermine the foundation of justice; they have raised a sack; the cry has gone forth; Seattle has been rallied, Tacoma has been rallied, Spokane has been rallied, and with Portland gamblers have joined hands to defeat the ends of justice and to let this gambler go unwhipped of justice in order that King Faro may rule, and that every man may be deterred from undertaking to stop him in his course.*" "Gentlemen, this case is now with you. The people will not be deceived; they cannot be deceived; they know where the right is, and you know where the right is, too. You know the element that are to day contesting in this court for supremacy. You know

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that on the one hand is law and order, and on the other hand is riot and bloodshed and disorder. You know that those two things are trying to gain the supremacy in this county. You know that one or the other will rule. If Charles Olds is allowed to go forth with your verdict registered one iota less than charged in this indictment; if it is said of him that he did not commit deliberate and premeditated murder, the shout will go forth to Spokane, the shout will go forth to these various places that Multnomah county juries will not convict gamblers, when they are clearly proven to be guilty; that Multnomah county juries will not do their duty in this regard, but that they will shirk it." "Can anybody dispute it? Has it not come to be, as I said, a by-word and a reproach that in the administration of the criminal law in these United States of America, the murderer frequently goes free?" "Unfortunately is it not found that there are jurors who do not do their full duty? *Because you know the tactics of the gambler*, the State needs twelve jurors to convict, and he only needs one. That is the test that is what has brought jurisprudence in this country into disrepute. That is what has caused the legislatures of various States to pass laws to try, if possible, to execute laws and to prevent money and power and wealth from impeding and stopping the goddess in dealing out her even-handed justice to all."

These are only a few excerpts from the address and were not all taken in the order in which it was delivered; but they are a faithful index to its tenor and spirit. It was a remarkable diatribe; it was a powerful invective against the gambling class, a severe criticism upon the police of the city, and also, indirectly, a damaging reflection upon the officers charged with the administration of the criminal law of the county. The eloquent attorney seems to have occupied the position of Samson when he pulled down the temple of Dagon on the heads of the Philistines, "and it fell upon him also." If the assumption that the attorney indulged in, that the gamblers of Portland had conspired to take Weber's life and Olds

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shooting him was a part of the conspiracy, could have been sustained it would have established the latter's guilt of the crime charged in the indictment beyond any question; but when he appeared in this court and attempted under the evidence to justify the verdict of murder in the first degree, he was unable to point out wherein it supported the assumption to any extent whatever; and there seemed no other excuse for his engaging in such extraordinary hyperbole than an excess of zeal bordering on frenzy. The proof, however, showed that some of the witnesses on the part of the defense were gamblers, and that they had assisted to raise a sum of money to aid Olds in his defense, which of course tended to impeach their testimony. The claim of the district attorney that the gamblers had conspired to take Weber's life and raise a fund to secure Olds' acquittal and corrupt the foundation of justice, seems to have been predicated, in the main, upon the testimony elicited from Thomas Williams on his cross-examination. The witness had testified as to threats made by Weber against Olds, and in regard to Weber's bad character and Olds' good character. It appeared that the witness, among other occupations, had been engaged in the gambling business. He also testified that he had taken a good deal of interest in the case, had raised money for the defense amounting to about three thousand dollars, about half of which he contributed himself; that he visited Seattle and Tacoma, and had written to Spokane Falls in the interest of the accused. Upon his re-direct examination he was asked to state the reason why he took this interest in Olds, and he answered: "Simply because he asked me to. He sent for me after this man was killed; I guess I was the first man that saw him, and I think I was about the only gambling man in the town at the time. He sent for me, and I went to the city jail to see him, and he told me what had happened, and he says: 'I haven't got a quarter; will you do what you can for me?' I told him I would, and I made my word good as near as I could." The witness further testified that he had been feeding

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Olds while he was down stairs, sending his meals to him. The harangue of the district attorney to the jury was highly sensational, and served, no doubt, to incite their passions and prejudice against the accused; but, unless justified by the evidence, was quite out of place. The trial of a fellow-being for murder, where the penalty is death, devolves a grave responsibility upon the attorney for the State as well as upon the court and jury, and a conviction should never be urged unless justified by the proof, fairly weighed and considered. It is to ascertain the truth and apply the law, and a resort to imagination or fancy in order to incite the passions and prejudices of the triers, is a deviation from the true and proper course. To convict and put to death a human being through the influence of prejudice and caprice is, morally, murder, and more pernicious in its consequences, by far, than the escape of a guilty person; and the forms of law should never be prostituted to such a purpose. It is claimed by the counsel for the State that the manner of the accused when he did the shooting, and the language made use of by him, showed deliberation and premeditation. But I do not think that what he did or said on that occasion proves that he had previously designed to take the life of Weber. His having the appearance of being cool, his firing the number of shots he did and the remark he made after Weber was killed were acts as liable, or even more so, perhaps, to attend upon a hastily-formed design to kill, as upon one formed in cool blood. Said counsel also claims that as the trial court was not called upon to make any ruling regarding the sufficiency of the evidence to warrant the conviction of murder in the first degree, no question can therefore be made upon that point in this court; that the question must be raised there before it can be considered here.

It has been held repeatedly by this court that it had no authority to review the decision upon a motion for a new trial; and has been indicated very strongly a number of times that the question as to the sufficiency of the evidence

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to support the judgment or conviction, must have been first passed upon in the trial court. But whether that rule should be adhered to in a capital case has never before, that I am aware of, been pressed upon the attention of the court. I have always been of the opinion, since my attention was called to the matter, that where the evidence in a capital case is shown to be clearly insufficient to warrant a conviction, it would be the duty of this court, under its supervisory power over the circuit courts, to reverse the conviction and order a new trial. If, for instance, a case were brought here where the accused had been convicted of murder in the first degree and the evidence showed affirmatively that the *corpus delicti* had not been proven, we could not, it seems to me, affirm the conviction. The counsel for the appellant cites in his brief a number of decisions from the courts of other States to the effect that the appellate court will not apply in capital cases the rules which govern trial courts in other cases with the same strictness, and I am of the opinion that such a rule should obtain here. I think it the duty of a trial court, at all events in a case of murder, where the evidence is not sufficient to warrant a conviction of the highest grade of the offense charged, to instruct the jury of its own motion to that effect. "It is," says Blackstone, "the noble declaration of the law that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular." Black. Com. (Cooley's ed.) *354.

I have thus far omitted any reference to the testimony of the witness Milton Weidler contained in the statement herein. The district attorney seemed to rely upon this testimony, in his argument to the jury, as proof that Olds was lying in wait to kill Weber, as it appears in one of the extracts from his speech above set out. That testimony, however, was clearly incompetent, as the witness would not swear that the man he saw standing by the fire-plug was Olds, and could not describe the man further than that he was a heavy-set man, and the court committed palpable error

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when it allowed the witness to testify to what he said to his friend as to his belief that Olds was standing on the corner when he passed. If the witness had seen Olds standing at the place at the time referred to, his testimony to that effect would necessarily have been damaging to the accused; but he could not swear, nor describe the man he saw so that he could be identified as Olds. He should not, therefore, have been permitted to eke out his evidence on that point by testifying to the expression he made use of when he heard the announcement that Olds had shot Weber, regarding his mental impression that the man he saw standing on the corner was Olds. It was a mere surmise on the part of the witness, yet admitting it in evidence under the particular circumstances was highly prejudicial to the accused.

There are other questions in the case which have been discussed, but it is not necessary to specially consider them. The counsel for the accused had the right to have the two instructions requested by them given in some form to the jury; whether they were included in the instructions given may be questioned, but the solution of that question is not necessary to the decision of the case, and probably will be obviated in the future.

After a thorough examination of the facts in the case, I am constrained to believe that the accused has not had such a trial as the law accords to parties charged in capital cases. That he is a gambler and a worthless member of community, may be true; but he is on trial for his life, is within the pale of the law, and the courts can do no less than to require that the law be administered in his case as in all others—in accordance with its letter and spirit.

I am of the opinion that the judgment of conviction should be reversed and the case remanded for a new trial.

LORD, J. dissenting.—Upon the points discussed, my views are briefly these:

First—That an opinion formed from newspaper reports does not disqualify a juror when it is such as will yield to the evidence which may be adduced, and it appears that he

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can give the defendant a fair and impartial trial; that "all men," as Butler, C. J., said, "take newspaper statements as current news, liable to qualification, explanation or contradiction, and when qualified, explained or contradicted, they change their opinions or belief accordingly as a matter of course"; so that the opinion which should exclude a juror must be of a fixed and settled character; showing that his mind is not open to the reception of testimony and partaking, in fact, of the nature of a pre-judgment, and finally, that the trial court has a better opportunity to judge of the juror's fitness and competency upon the whole examination conducted in its presence and hearing, than can the appellate court from a bare inspection of the record alone.

Second—That the motion for a change of venue on account of prejudice alleged to have been produced in the public mind by exaggerated newspaper reports that would prevent the defendant from having a fair and impartial trial, controverted by counter-affidavits on behalf of the State to the effect that the accused could have a fair and impartial trial, and that a jury could be selected from the body of the county, was addressed to the discretion of the trial court, and is not reversible error, except for manifest abuse and injustice; that the books abound in cases which show upon applications of this kind, that where, soon after the killing, false and exaggerated statements are alleged to have been published concerning the transaction in newspapers of general circulation in the county, and that these publications reflected severely upon the defendant's character and greatly inflamed the public mind and prejudiced the people against him, controverted by affidavits on behalf of the State to the effect that the affiants were acquainted with the feelings and sentiments of the people, and that no excitement or prejudice existed against the defendant which would prevent him from having a fair and impartial trial; that such applications are addressed to the discretion of the trial court, and refused to interfere, and that, except in special cases, any interference of the appellate

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court is more likely to result in a failure of justice than in depriving the accused of a fair and impartial trial.

Third—That this court cannot review, as has been done in this case, the determination of the trial court upon a motion to set aside the verdict on the ground of the insufficiency of the evidence, because (1) such motion is not reviewable in the appellate court, and that it has been its constant practice from *State v. Fitzhugh*, 2 Or. 230, to *State v. Clements*, 15 Or. 243, in which THAYER, C. J., said, as to the identical point now raised: "This court long ago held that a matter [motion to set aside the verdict] of that character is not reviewable. Counsel, however, continued, from time to time, to persist in urging such questions upon the consideration of this court, and seem to think that unless they are able to raise them, judgments are liable to be given without sufficient evidence in law to sustain them. But such results are not liable to follow if counsel will properly present them. This court will not uphold a judgment where the evidence is not sufficient in law to justify its rendition, *if the question is properly made, which can be done by a motion at the trial to discharge the defendant upon that particular ground and including all the evidence in the bill of exceptions tending to establish his guilt.* So, also, a question regarding the sufficiency of the proof of a particular fact in the case may be reviewed here, but it must be raised by an exception at the trial. Should the trial court say to the jury that if they found such and such facts, and there was not sufficient evidence in law to authorize such finding of all or any of the facts thus submitted, an exception in either case could be saved and made available. All the evidence, however, would have to be certified to this court, bearing upon the same, in the statement of the exception; and the statement in such case must purport to contain all the evidence upon the point. *This court has nothing to do with the rulings of the trial court upon a motion for a new trial or to set aside the verdict of the jury. It deals only with questions of law, and they must be squarely presented as such.*" Because (2) the rule as thus

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declared and steadily maintained is better adapted to protect all the legal rights of the accused, and to meet the ends of justice by presenting the particular matter or point, as here, the fact of premeditation and the evidence in respect to it alone, so that the appellate court can examine and pass directly upon it without wading through a voluminous mass of other matter about which there is no controversy. Because (3) the determination of the trial court cannot be reviewed for the reason, as Story, J., said, that "it is not a matter of absolute right in the party, but rests in the judgment of the trial court, and is to be granted only when it is in furtherance of substantial justice; but that the case is far different, upon a writ of error, bringing the proceedings at the trial by a bill of exceptions, to the cognizance of the appellate court. The directions of the trial court must then stand or fall upon their own intrinsic propriety as matters of law." As such rule is operative to prevent a judgment without sufficient evidence in law to sustain it, it ought to stand and its reversal will be apt to needlessly multiply new trials, and perhaps to cause a failure of justice. Because (4) that the cases referred—*State v. Cody*, 18 Or. 506, and *State v. Hunsaker*, 16 Or. 497,—are not authorities to look into the case and pass upon the sufficiency of the evidence upon a determination of a motion of this character; but that the first, *State v. Cody*, was brought to the cognizance of the appellate court upon an exception to the trial court's refusal to direct a verdict for the defendant and that he be discharged, or that the court instruct the jury that the defendant could not be convicted of the crime of mayhem, for that the evidence was insufficient to justify the same, and not for the refusal of the trial court to set aside the verdict; and in the other, *State v. Hunsaker*, while STRAHAN, J., expressed his personal opinion to that effect, the court did not decide and he expressly added: "But we do not consider or decide that matter now." So that there is not only no authority in our practice to justify it, but the rulings, as already shown, have been constantly the other way.

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But if these precedents are to be disregarded and overturned to meet the exigency of the case at bar, and the evidence examined upon a motion for a new trial after verdict, then (5) my contention is, that there is evidence, disclosed by the record, of facts and circumstances tending to show premeditation; that the evidence shows that the parties had had a previous quarrel and fight; that afterwards, and upon the day of his death, Weber called upon one Sliter and told him that the defendant Olds could no longer continue to run the game over the Crystal Palace saloon, and that Sliter communicated this information to the defendant Olds, and requested him to leave the city; that Olds walked up Third street to the corner of Alder, and that at the time he was armed with his pistol in his right-front pants pocket, and that he had his hand on it, and there met Weber and said to him: "I hear you have been about town looking for me?" and, before Weber could make full reply, commenced firing, and after shooting four bullets into him, after his victim lie dead, or dying, at his feet, threw back his coat, put in his revolver, then took out his handkerchief and calmly took off his hat, wiped his brow, wiped his hat, walked around the body, and before leaving saying, "Now, you s— of a b—, you have got me!" tending to show that his mind was made up to answer his own inquiry in the way it was done before Weber could reply. One witness, when asked, "What time would you say elapsed between the time Olds addressed the remark, 'Mr. Weber, I understand you have been looking for me,' until he fired the shot?" answered that "it was almost instantaneous," and that Weber had hardly completed his reply, "You s— of a b—, what do you want with me?" when the first shot was fired, tending to show that the question was not asked to elicit an answer, but that it was asked and followed so instantly by pistol shots as tended to indicate that the purpose to take Weber's life was already formed when it was done. When all the facts are taken together—the fight which had preceded; Weber's conversation with Sliter, which he had

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imparted to the defendant Olds, and which indicated a purpose to break up his gambling game; Olds going armed to the corner of Alder street, his stopping there, and when Weber came along addressing to him an inquiry that tended to show that what Sliter had told him was then in his mind, but followed so quickly by pistol shots as tended to indicate that no reply was expected, but that he was executing a purpose already formed, and his manner after the killing, so comparatively free from excitement or passion, deliberately putting back his revolver into his pocket, calmly wiping his brow, his hat, and walking about his victim—leaves him with the remark: "Now, you son of a b—, you have got me"; or, as the facts would seem to tie together, you have been looking for me and now you have got me, tending to indicate a state of mind that was not acting on the impulse of the moment, but exercising a purpose already formed with deliberation to insure certainty in its results.

It may be that there is testimony of other witnesses which would contradict this, or from which different inferences may be drawn, or which would tend to support some other theory, or from facts admitted and even undisputed as to what is the proper deduction, where different men equally sensible and impartial would make different inferences, but that only serves to show that the law commits the case to the decision of the jury and not the court. For, in passing upon the sufficiency of evidence by a court, "it must be assumed," said Judge Dillon, "that all the evidence in the case is true, and that the witnesses are all credible, for if there are questions relating to the credibility of witnesses, or if what the evidence proves depends upon the credibility of witnesses, or upon the proper deduction to be drawn from the evidence, these are questions not for the court but for the jury under the direction of the court." That rule applied to the evidence disclosed by this record makes this a case for the decision of the jury and not for the court, as it is their province to decide

Points decided.

questions of fact, as it is of the court to decide questions of law.

Fourth—That the testimony of Weidler is merely cumulative, and that there is sufficient evidence to support the verdict without it, and therefore, its admission, conceding it to be incompetent, was without prejudice and is not reversible error.

Fifth—That the remarks attributed to the district attorney as improper and inserted in the record, were not excepted to and brought to the attention of the trial court for its decision, and cannot now be raised for the first time in this court within the ruling and decision in *State v. Abrams*, 11 Or. 172, in which Watson, J., said: "Some of the remarks attributed to Mr. Dorris were undoubtedly improper and can hardly be condemned with too much severity. But however reprehensible, there is one insuperable obstacle to their being considered here as ground for reversal—they involve no error in the court below. We have announced this principle before. *State v. Anderson*, 10 Or. 448, and we now lay it down as a rule, to which there is no exception, that no objection to proceedings in the court below can be heard in this court which is not based upon alleged error in judicial action on the part of the lower court."

In view of these considerations, much as I regret to differ with my associates, as I understand the law and the practice so long and steadily adhered to by this court, I cannot consent to disregard and overturn them, and have, therefore, no other alternative than to dissent.

[Filed July 1, 1890.]

E. K. ANDERSON, APPELLANT, v. W. P. HAMMON AND
E. W. HAMMON, RESPONDENTS.

LEASE—EQUITABLE JURISDICTION—CANCELLATION.—Where the neglect and omissions of the defendants to perform their obligations under a lease resulted in waste, which, if permitted to continue, must eventually result in the ruin and destruction of its subject matter to the irreparable damage of the plaintiff; *held*, that equity would interfere and cancel the lease to prevent such waste and destruction.

APPEAL from Jackson county: L. R. WEBSTER, judge.

This was a suit in equity brought by the plaintiff and appellant to have a lease cancelled, and for damages, and for a temporary injunction pending the suit. A large amount of evidence was taken; and, after a full hearing, the court found that the evidence failed to sustain the complaint and dismissed the suit. From the decree rendered herein this appeal is taken.

H. K. Hanna and Francis Fitch, for Appellant.

C. W. Kahler, for Respondents.

LORD, J., delivered the opinion of the court.

The plaintiff in his complaint alleges, that at the execution of the lease sought to be cancelled he was the owner of a valuable apple orchard, consisting of thirty acres, and also twenty acres or more set with peach, plum and apricot trees; that each was in a good and healthy condition when taken possession of by the defendants; that, induced by the representations of the defendants, they would cultivate, prune and care for said orchard if a lease could be obtained for the same, the plaintiff entered into a written lease with the defendants to have said orchards for the period of five years, in which they agreed to properly cultivate and prune the same according to the rules of good horticulture, plowing at least one way each year, etc., but that by reason of the neglect and failure of the defendants to properly cultivate said orchards, they were overrun with suckers, water-sprouts and orchard pests, so that the trees were and are going rapidly into decay and ruin, to the irreparable injury of the plaintiff.

The answer admits the lease, etc., but denies specifically the neglect or failure to comply with the terms of the lease and all else material. The contention of the defendants is, that, under the lease, they were not required to do any particular amount of cultivation or pruning; that they only agreed to "prune and cultivate the orchards according to the rules of good horticulture," and that the only

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indication of the amount of cultivation is limited to "plowing at least one way each year," and consequently were not bound to grub out the trees, to cut out borers, to take proper measures to destroy the woolly aphis, or other insect life detrimental to the healthful condition of the trees.

The evidence shows that the plaintiff and the defendant W. P. Hammon, previous to the execution of the lease, had several conversations in respect to the cultivation and preservation of fruit and the production of fruit thereon, and that the defendant professed, and so represented himself, to be versed by study and experience in horticulture; and that the plaintiff, impressed with the value of such knowledge and experience in fruit raising, and the ability of the plaintiff to handle and care for his orchards so as to make them more profitable, and to improve and keep such orchards in good condition, and the trees in the best state of productiveness, was induced by the defendant to make the lease for the period named, which he represented to be necessary to effect such objects, keep the trees renovated and in good fruit-bearing condition, and reap the advantages suggested. It also shows that the defendant took the plaintiff into his orchard and explained to him wherein he failed, how the insect pests which often injured and destroyed the trees could be removed and exterminated, and how, according to good horticultural methods, the health of the trees could be maintained and their fruit-bearing qualities preserved; that after several conversations of this character, the defendant himself drew up the lease and it was signed in view of these facts and under such circumstances. The evidence shows that suckers growing around the roots of fruit trees exhaust the nourishment that should go to the support of the trees; that water-sprouts growing after heavy pruning produce a similar effect; that the aphis infesting an orchard, when left to itself, eventually injures or kills the trees, and that the borer in a peach and apricot orchard, if not removed with a knife, produces a similar effect upon those trees.

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It is clear, then, to properly care for and cultivate an orchard, that it is necessary that one should look carefully after these matters to prevent the decay or destruction of the trees and to preserve them in a healthy, fruit-bearing condition, for it is conceded, unless suckers are removed, and these pests are checked or exterminated, the orchard will finally go into decay and be irreparably injured.

Whose duty, then, was it, under this lease, to attend to these matters? It would seem to me that the language of the lease necessarily included attention to these matters without their express mention. To prune and cultivate an orchard according to the best horticultural methods, would require the doing of all those things which are essential to keep the trees in a good condition and preserve their fruit-bearing qualities, which would include the cutting off of suckers and water-sprouts when necessary to the health of the trees, as well as the taking of proper steps to remove insects pests, which sapped their lives, when the trees are so infested. But if there was any doubt as to the proper construction to be given to the lease, when what preceded and induced the making of the lease is considered, such doubt must be removed and the duty of the defendants in the premises made plain; they must have understood their obligation to include the removal and destruction of all such insect pests as were detrimental to the health of the trees. The lease was obtained and the possession of the orchard upon the reliance placed in the representations of the defendant W. P. Hammon; and under the circumstances the defendant must have known how the plaintiff understood it, and also that the defendant W. P. Hammon would give his personal attention to the cultivation of the orchards, according to the rules of good horticulture as understood and explained by him. That he did not do so, but left the matter in other hands and went to California, is not disputed. That by reason of the neglect and failure of the defendants to comply with their agreement and properly cultivate and care for the orchards, we think the evidence shows that suckers and

Points decided.

water-sprouts were allowed to grow and overrun the apple orchard, and that both orchards were infested with insect pests, which seriously injured the healthful condition of the trees, killing some and causing others to go into decay, and which, if permitted to continue without any effort at abatement during the period of the lease, must result in the ruin and destruction of these orchards and irreparable injury to the plaintiff.

Under such circumstances it seems to us a court of equity ought to interfere and prevent the decay and eventual ruin and destruction of these orchards by cancelling the lease and arresting the progress of its waste from the failures and omissions of the defendants.

We think, therefore, the court erred in dismissing the suit, and that the cause must be remanded to take the account prayed for with directions to cancel the lease and make the injunction perpetual, and it is so ordered.

[Filed July 1, 1880.]

S. A. KEEL, RESPONDENT, v. F. LEVY, APPELLANT.

PLEADING—FRAUD.—Unless fraud or illegality be pleaded and proven by a preponderance of the evidence, the writings executed by the parties must be enforced according to their legal import.

FRAUD—PROOF OF.—Fraud is a matter of fact which must be proven; it is never presumed. It may be established by circumstances; but the circumstances relied upon must be of such a satisfactory character as to convince the mind of the trier of the fact that the transaction was a sham and not what it purports to be.

MERGER—QUERE.—Whether the holder of a note secured by a chattel mortgage who caused the mortgaged property to be attached on another debt due to him by the mortgagor and sold, and such mortgagee purchases the same at the sale, and there is nothing to show that he intended to keep the mortgage alive as a lien, the mortgage is merged, *quere?*

SURETY—SUBROGATION.—When the principal and surety each mortgages his own property as security for the debt of the principal, and the surety pays the debt, the principal's mortgage given to secure such debt passes to the surety by operation of law. He is subrogated to all of the rights of such creditor.

PRINCIPAL AND SURETY—SEPARATE MORTGAGES BY EACH TO SECURE PRINCIPAL'S DEBT.—Where the principal and surety have both mortgaged property to secure the debt of the principal, the surety is entitled to have the property of the principal sold first and applied in satisfaction of the debt.

CHATTEL MORTGAGE—GROWING CROP.—The lien of a chattel mortgage on a growing crop follows the grain after severance and removal and the money after sale.

19	450
124	370
19	450
48	574
19	450
48	608

Statement of facts.

APPEAL from Marion county: R. P. BOISE, judge.

This suit is prosecuted by the respondent to secure a partition of certain personal property consisting mainly of grain grown upon the defendant's farm and some land leased of other parties. The grain was raised by the plaintiff and one Rickey as partners. During all of the times mentioned in the pleadings, Rickey was indebted to the defendant in a large amount of money. After the grain had been sown, Rickey executed a mortgage to one A. Grant on his interest in the grain to secure the payment of \$700 which he had theretofore borrowed of Grant, under a contract that said mortgage should be executed after the grain had been sown. Afterwards, for the sole purpose of additional security for the \$700 borrowed of Grant by Rickey, the plaintiff executed a mortgage on his interest, being one equal undivided third of the same crops. Plaintiff's note was for \$708.50. Keel's mortgage contains the following recital: "The above note, together with the mortgage to secure the same, is given by me to said A. Grant in consideration of \$708.50, loaned this day by said A. Grant to James M. Rickey at my special instance and request; and this note and mortgage is given by me to said A. Grant to secure said A. Grant the payment of the note and mortgage given this day by said James M. Rickey for said sum of \$708.50 in case said James M. Rickey failed to pay on demand his said note; said note so given being dated April 2, 1888, due one day after date, principal \$708.50, with interest at ten per cent per annum from date until paid, and for reasonable attorney fees; and that it is further agreed that when said Grant's claim is fully satisfied, my responsibility is to cease." After the maturity of these notes, and when they were over due, the plaintiff purchased them, as well as the mortgages, for the consideration of \$710. He then caused an action to be commenced in his name against Rickey to recover a large amount which Rickey then owed him, and caused Rickey's interest in said grain to be attached, harvested by the

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sheriff and then sold, at which sale the plaintiff became the purchaser. The amount of plaintiff's judgment in said action was \$2,928.34 and costs, and the amount of plaintiff's bid for Rickey's interest was \$1,113.50. The sheriff, after his levy under the attachment, harvested all of said crops, and his expenses and charges amounted to \$1,058.79, which were paid by the defendant Levy.

Timon Ford and Wm. H. Holmes, for Appellant.

J. J. Murphy, for Respondent.

STRAHAN, J., delivered the opinion of the court.

The fact that Keel executed his note and mortgage on his one-third interest in the crops as surety for the \$700 borrowed by Rickey of Grant, must be taken as established by a clear preponderance of the evidence. Such is the plain import of the mortgage made by Keel to Grant, and it is not attacked for fraud, either by the pleadings (*Misner v. Knapp*, 130, 135) or, directly, by the evidence. It is true the appellant refers to some of Keel's evidence on his cross-examination in relation to borrowing money, from which it is suggested an inference of fraud might be drawn, but I do not think this is enough. Nor is this evidence alone sufficient upon which to predicate any such conclusion. Fraud is a matter of fact which must be proven; it is never presumed. It is true direct evidence on the subject is rarely attainable. It is therefore, be established by circumstances; but the circumstances relied upon must be of such a satisfactory character as to convince the mind of the trier of the fact that the transaction drawn in question was a sham and not what it purported to be. The evidence relied upon by the appellant on this point falls short of that. Briefly, it is that Keel had in his possession about that time the sum of \$800, and when questioned where he obtained it, the account he gave was unreasonable and improbable; hence it is insisted that the loan from Grant was really for Keel's use, and that, therefore, he is the principal debtor and Rickey

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the surety. There is a possibility that this assumption may be true, but in questions of this nature the court cannot act on possibilities. Proof that is satisfactory, that which is strong enough to overthrow the solemn writings executed by the parties at the time, is requisite, and that I am unable to find in this record.

2. Treating these writings, then, for just what they purport to be, the question, what are the rights and liabilities thereby created, is presented for consideration. Whatever rights Grant had under the mortgages were transferred to Levy by the assignment, and he acquired no other thereunder. The facts, then, briefly recapitulated, are these. Rickey borrowed \$700 of Grant and gave his promissory note therefor, secured by a chattel mortgage on an undivided one-third of certain growing crops; afterwards Keel, as additional security for the same debt, made his promissory note secured by a chattel mortgage on his undivided one-third of the same crops. After said notes fell due, Levy, for the consideration of \$710 paid to Grant, purchased said notes and mortgages, and they were assigned to him. He then caused Rickey's interest in the crop to be attached and sold on a debt due from Rickey to himself and purchased the same at such sale. He now claims that the Rickey note remains unsatisfied and that he may resort to the Keel mortgage for payment. To this appear several objections. When Levy purchased Rickey's interest in that grain, being also the holder of the mortgage thereon, it is difficult to see why the mortgage interest was not merged. By that purchase the entire interest becomes vested in him and there is nothing to show that he intended to keep the mortgage in force as a lien. 1 Jones on Mortgage, § 871; *Ottom v. Cotton*, 3 Phil. 24; *Klock v. Cronkhite*, 1 Hill, 107; *Shaver v. Williams*, 87 Ill. 469; *Lynch v. Pfeiffer*, 110 N. Y. 33. If a merger did take place, which we do not now deem it necessary to decide, for other reasons presently to be stated, then the mortgage ceased to exist; it was drowned in the greater estate, and Keel would be exonerated.

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3. But there is another objection to the defense relied upon. If Keel's property should be applied to pay off Rickey's note and mortgage, he would at once be subrogated to Levy's rights under Rickey's mortgage and would be entitled to have the property which Rickey mortgaged applied in payment of the debt. In other words, by operation of law, Rickey's note and mortgage would be assigned to him. 3 Pomeroy's Eq. Juris., § 1419, and authorities there cited; *Fields v. Sherrill*, 18 Kan. 365; *Low v. Smart*, 5 N. H. 353; *Muir v. Berkshire*, 52 Ind. 149. But by the sale of this mortgaged property Levy has destroyed the fund to which Keel was entitled to resort to reimburse himself had he paid Rickey's debt, and for that reason alone I think Levy has precluded himself from resorting to Keel's property for payment.

4. One other objection. Where the principal and surety have both mortgaged property for the debt of the principal, the surety is entitled to have the property of the principal sold first and applied in satisfaction of the debt. *Neimcewicz v. Gahn*, 3 Paige Ch. 614; *James v. Jaques*, 26 Texas, 320. In this case, the defendant Levy, having caused this mortgaged property to be sold on another process for his own benefit, has received the proceeds of the sale and has the same now in his possession. Under the particular facts disclosed by this record, I think the law would apply such proceeds in exoneration of the plaintiff's property, and that Levy could not be permitted to apply the same on his individual debt to the injury of the plaintiff. That grain was mortgaged to secure Rickey's debt, as well as the grain of the plaintiff, and that fact gave the plaintiff the right to insist that Rickey's grain should be first applied in payment of Rickey's debt. The defendant Levy stands in no position to contest or deny this right. Rickey's grain brought \$1,115.50. The sheriff's bill for harvesting the entire crop was \$1,058.79. Assuming without deciding that Rickey was properly chargeable with one-third of this expense because he owned one-third of the grain harvested, his portion of the

Points decided.

expense would be \$352.93. Deducting this amount from the proceeds of the sale, \$1,115.50, and there remained \$762.67 to be applied in discharge of Rickey's mortgage, or so much thereof as was necessary. It seems to me this view of the subject alone is enough to entirely dispose of the contention of the defendant. The propriety of this application of the money cannot be questioned, for the reason that the lien of the chattel mortgage on a growing crop follows the grain after severance and removal, and the money after sale. *Muse v. Lehman*, 30 Kansas, 514; *Rider v. Edgar*, 54 Cal. 127.

5. But it was substantially conceded upon the argument that the fact is established by the evidence that the defendant paid for harvesting the grain, \$866. The plaintiff gets the benefit of one-half of this sum, namely, \$433; which we have concluded to deduct from the decree appealed from.

The decree appealed from will therefore be modified to this extent and all other respects affirmed.

The appellant recovers costs in this court.

[Filed July 1, 1890.]

J. P. FAULL, APPELLANT, v. H. W. COOKE, RESPONDENT.

PUBLIC LANDS OF THE UNITED STATES—HOMESTEAD CLAIMANT.—TITLE BY RELATION.

—By the act of congress of March 14, 1890 (21 stat. 141), any settler who had or should thereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, was allowed the same time to file his homestead application and perfect his original entry in the United States land-office as was allowed to settlers under the preëemption laws to put their claims on record, and his right relates back to the date of settlement, the same as if he settled under the preëemption laws.

HOMESTEAD CLAIMANT'S RIPARIAN RIGHTS.—A homestead claimant's riparian rights attach from the date of his settlement provided he complies with the law and obtains a patent for the land; and when such patent is issued it relates to the date of settlement and cuts off the right to divert a stream of water running through such homestead.

TO MAKE TITLE UNDER AN EXECUTION SALE, THE JUDGMENT MUST BE PROVEN.—An execution, regular upon its face, emanating from a court of competent jurisdiction, will protect an officer who obeys it; but when a purchaser claims title under an execution sale, the judgment upon which the execution was issued must be proven.

EXECUTION—WHEN TO BE RETURNED.—By section 278, Hill's Code, an execution is returnable within sixty days after its receipt by the sheriff; and by section 293 the time may be enlarged thirty days by the consent of the plaintiff endorsed upon the writ.

19	455
21	118
26*	662
27*	14

19	455
24	187
24	303
26*	662
33*	530
33*	569

19	455
27	18
28	491

19	455
39	69

19	455
42	272

Statement of facts.

EXECUTION AFTER TIME TO RETURN HAS EXPIRED IS FUNCTUS OFFICIO.—When there has been no levy under an execution, and the return day has expired, and the writ is *functus officio*, and confers no authority whatever, and a levy and sale by virtue of it is a nullity.

HOMESTEAD—EXEMPT FROM FORCED SALE FOR DEBT CONTRACTED BEFORE THE ISSUANCE OF PATENT.—Under the act of congress granting homesteads to actual settlers on the public lands of the United States, a homestead is not liable to be sold by virtue of an execution issued upon a judgment rendered for a debt contracted before a patent is issued for such homestead. *Clark v. Bayley*, 5 Or. 343, followed.

DEED—AN EX-SHERIFF HAS NO POWER TO EXECUTE.—The sheriff in office at the time the certificate is produced and the deed demanded is the proper officer to make the deed, and not the one whose term of office has expired, although he may have made the sale before his office expired.

ADVERSE USER OF WATER—EVIDENCE EXAMINED AND HELD INSUFFICIENT.—The evidence as to adverse user of the water in controversy examined and held insufficient to prove an adverse user for ten years.

APPEAL from Baker county: L. B. ISON, judge.

The object of this suit is to enjoin the defendant from disturbing the plaintiff's use of certain water taken out of Connor creek in Baker county, Oregon, and to establish and quiet the plaintiff's title thereto. The substance of the plaintiff's complaint is as follows: That in the year 1877 the plaintiff's grantors, then being citizens of the United States of America, constructed a ditch from a point on Connor creek, then and now being a national water-course, in Baker county, State of Oregon, through the unoccupied and unappropriated public lands of the United States of America, to a point known as Douglass gulch, which said gulch debouched into Snake river, in said county; that said ditch was of the capacity of about two hundred and fifty inches of water; that plaintiff's grantors appropriated at said time 260 inches of water of the waters of said Connor creek, and conveyed the same through said ditch to the said Douglass gulch for the purpose of mining in said gulch themselves, and for the purpose of sale thereafter to other miners, and for the purpose of sale to ranchers and farmers for irrigating purposes; that at the date of said construction and said appropriation, plaintiff's grantors were the owners of all the ditches and water rights on said Connor creek below the point where said ditch taps said Connor creek, as hereinafter alleged, and had the right at that point to appropriate all the waters of said creek, and

Statement of facts.

did so appropriate the same; that the plaintiff and his grantors from the date aforesaid have used continuously through said ditch up to the time of the commission of the acts of the defendant hereinafter set forth the waters of said Connor creek for mining, sale to miners and sale for irrigating purposes, and that said ditch and water are of the value of \$5,000; that the plaintiff is now the owner, by proper conveyances from his grantors, who constructed said ditch and appropriated the waters of Connor creek, as aforesaid, of said waters, and also all of the ditches and water rights below the mouth of said ditch existing at the time of the construction of said ditch, and the appropriation of the waters of Connor creek, and has been the owner thereof ever since 1886; that about the fifteenth day of March, 1888, the plaintiff sold, to be used during the irrigating season of 1888, 260 inches of water to E. M. Hill, to be conveyed through said ditch and used upon the farm of said Hill for the purpose of irrigating the crops upon said farm, to wit: fifty acres of meadow land, about five acres of orchard and five acres of corn and garden land. Plaintiff alleges that the use of the waters aforesaid is reasonable and necessary for the purpose of raising and preserving said crops and said orchard, and that at the time of the acts of the defendant, hereinafter set forth, the said Hill was using said waters for the purposes aforesaid in a reasonable and proper manner, and that without the use of said waters so sold by the plaintiff to said Hill the crops of said Hill and his orchard aforesaid will be totally ruined; that said crops and said orchard are about the value of three thousand dollars. The plaintiff alleges that the location and appropriation of the waters of said Connor creek in the ditch aforesaid was made according to the local laws and customs of Baker county, and of the State of Oregon, and according to the decisions of the courts of the State of Oregon, and of the United States, and was and is prior to any other location by any other persons of any of the waters of said Connor creek below the head of said ditch; that on the twelfth day of April, 1888, while

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the said Hill was using the water of said ditch so sold to him, in irrigating his crops and orchard aforesaid, the defendant wrongfully and without any color of right entered upon said ditch at a point about one mile from the head of the same, and cut said ditch and turned the water off the same, and diverted the water therefrom, and let the same run to waste, and thereby prevented the said Hill from using the same for agricultural purposes; and since said day the defendant, on five occasions, and at five different times, at or about the place aforesaid, has cut the said ditch and turned the waters thereof to waste, and threatens to continue to cut the said ditch, and waste the waters thereof, whenever the plaintiff or said Hill repairs the same; that the said acts of the defendant and his declared intentions constitute a continuing trespass upon the rights of the plaintiff as the owner of said ditch and the said water right and of the right of the said Hill in the waters sold to him by the plaintiff, and will, if not prevented by the court, be an irreparable injury both to the plaintiff and the said Hill; that by reason of the said wrongful and malicious acts and trespasses committed as hereinbefore alleged, the plaintiff has been damaged in the sum of five hundred dollars; that the season during which water is used for irrigating purposes is now at hand, and that unless the defendant be enjoined from further interference with said ditch, and further trespasses, the crops upon which said waters are intended to irrigate will be wholly ruined and lost to the owner thereof.

After denying each material allegation of the complaint, the defendant's answer contains the following separate defense: That the defendant is the owner of certain real estate in Baker county, Oregon, described as follows: Lots Nos. 1, 2, 3 and 4, in section 14, and No. 2 in section 31, T. 12 S., R. E. 45 Willamette meridian, containing about 160 acres of agricultural, fruit-growing and grazing land, through which said Connor creek flows in its natural channel; that defendant is a riparian owner and proprietor in and upon said creek, and that defendant and his grantors

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are and have been seized and in possession of the said lands and of the said creek and its waters ever since about the month of —, 1869; that said lands are now used for agricultural, fruit-growing and grazing purposes, and have so been used for the period of about 18 years last past, and are of great value to this defendant; that said lands require artificial irrigation, and without it they are comparatively worthless; and that during all of said time of occupation and ownership, the defendant and his grantors have used the waters of said creek for said purpose of irrigating said land; that upon said land there are now growing about two hundred valuable fruit trees, besides a large amount of shade and ornamental shrubbery, crops, grass, etc., all of which is of the value of three thousand dollars, and that the yearly product of said land is of the value of about \$1,000; that in or about the month of —, 1869, defendants' grantors and predecessors appropriated about 300 inches of the waters of said Connor creek, and took the same by ditches from the channel of said creek, for mining and agricultural purposes, and for irrigating the aforesaid lands, and by said ditches conveyed the same to and upon the said land, and ever since said time have used and up to the commencement of this suit continued to use said waters for said purposes, and that defendant's rights in and to said creek and its waters are prior in time and right to any and all claims of plaintiff, and that said ditches above named are reasonably worth to the defendant the sum of \$1,000 or more; that on or about the — day of February last, the plaintiff, by his agents or employés, wrongfully, and with full knowledge of the defendant's rights and claims therein, entered upon the channel of said creek, at a point above defendant's ditches of recent use, and then and there, wilfully and wrongfully, and against the protest of this defendant and his agents, turned aside the waters of said said creek, and led and carried away the whole thereof; and, without the consent of defendant, did dig, cut and open a ditch upon and through defendant's said

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land for the purpose of conducting the waters of said creek to lands adjacent, and did so conduct the same away and still continues to do so, and thereby deprive the defendant of the same and of the use thereof, contrary to his rights therein, both as a riparian owner and as a prior appropriator; and that said ditch so dug and opened upon and through defendant's land, as aforesaid, is the same ditch mentioned and described by plaintiff in his complaint herein. Defendant admits that he cut said ditch, but wholly within and upon his own land, and for the purpose of restoring the waters of said creek to his own use on said land as aforesaid; that, by said wrongful acts of plaintiff and his agents, as aforesaid, the defendant is wholly deprived of the waters of said creek, and his ditches and trenches thereby rendered valueless, and his said fruit and other trees, crops, grass, etc., are in great peril, and unless said water is speedily restored to its natural channel and left to his use by and through the said last-named ditches, will soon be a total loss, to the defendant's damage as aforesaid, and the further and permanent injury to all of the defendant's said land.

The reply denies the new matter in the answer, and then alleges by way of avoidance thereof the following: That in the year 1875 one Christian Hinckler was the owner of the ditches and water rights mentioned and claimed to be owned by the defendant in his separate answer herein; that in said year all the right, title and interest of said Hinckler in and to said ditches and water rights were sold by the sheriff of Baker county, Oregon, under and by virtue of an execution and order of sale issued upon a judgment theretofore rendered against said Hinckler in the circuit court of the State of Oregon for the county of Baker; that the plaintiff's grantors were the purchasers of the said ditches and water rights at the said sheriff's sale, and that in the year last aforesaid the sale was duly and regularly confirmed by the said circuit court and a deed conveying the said ditches and water rights belonging thereto executed by the said sheriff to the plaintiff's

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grantors, as directed by said order of confirmation; that the plaintiff and his grantors, ever since the time of said sheriff's sale, have been the owners of and entitled to the sole use and possession of the same up to the time of the diversion thereof by the defendant as alleged in the complaint.

By the reply the plaintiff pleads the statute of limitations against the rights claimed by the defendant in his answer, and further seeks to fortify his own claim to the use of the water by pleading the statute of limitations.

The pleadings on neither side were questioned in the court below by either a motion or demurrer. The evidence was all taken in writing upon an order of reference from which the court below found the facts and law in favor of the defendant and rendered a decree in accordance with such findings, from which the plaintiff has appealed.

C. H. Carey, for Appellant.

M. L. Olmsted and *J. F. Watson*, for Respondent.

STRAHAN, J., delivered the opinion of the court.

A proper disposition of this case requires that we should notice the sources of title set up by the respective claimants, and in doing so it will be most convenient to first examine the defendant's title. In the year 1869 the lands through which Connor creek flows, and which are described in the defendant's answer, were unsurveyed and unoccupied public lands of the United States. During that year one Christian Hinckler settled upon the same as a homestead, and after the said land had been surveyed, on the sixth day of March, 1883, he made his regular application therefor, alleging his settlement thereon in February or March, 1869. On this application a patent was duly issued by the United States to said Hinckler, dated the thirteenth day of March, 1885. After Hinckler had perfected his right to said land under the homestead laws of the United States, he died intestate in Baker county, Oregon, and John Geiser was duly appointed his administrator. There-

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after such proceedings were had in the county court of Baker county, Oregon, in the administration of said estate, that an order was duly made by said court, by virtue of which order the said real estate was sold by said administrator to the defendant Cooke for the sum of \$1,550. This sale was duly confirmed by said court, and on the fifth day of July, 1887, said administrator executed and delivered to the defendant Cooke a deed to said premises, together with all the water rights and privileges, ditches and ditch rights, and all and singular the improvements, tenements, hereditaments and appurtenances.

The evidence tends to show that as early as 1872 Hinckler, commencing on his homestead and near the line, cut a ditch extending nearly the entire length of his claim, by means of which he diverted the waters of Connor creek for the purposes of irrigating his land for agricultural and horticultural purposes, and that this claim is bounded on one side for almost its entire length by Snake river, and that Connor creek flows almost directly across the defendant's land and empties into said river on said premises, so that there are no riparian owners below the defendant on said creek. In 1874 Hinckler dug another ditch by which he diverted a portion of the waters of Connor creek, commencing a short distance above his land, by which means he conveyed the water to his land and for a long distance through the same, and then, again leaving his land, the water was conveyed to a placer mining claim, where the same was used for some time for mining. After the mine was worked out, the water flowing in this ditch was also used by the said Hinckler for irrigating his land. Hinckler's ditches are numbered respectively one and two. Ditch numbered three taps Connor creek above number two and conveys water to the land of Hill, mentioned in the pleadings. This is an old ditch, but was dug after the ditches numbered one and two, and was repaired and used by Hill some three or four years ago. The ditch marked number four on the plat taps Connor creek a long distance above number three, and is known as the Tarter & Huffman

ditch, and was used for awhile to convey water to a placer mine in Douglass gulch. It was also constructed after Hinckler had settled upon his homestead and had diverted the water from Connor creek in both ditches numbered one and two. Whatever right, title or interest Hinckler had in the land described at the time of his death passed to the defendant by virtue of the deed made by the administrator of Hinckler. It is therefore necessary to determine what rights Hinckler acquired in said land by virtue of his homestead settlement and subsequent compliance with the act of congress granting homesteads to actual settlers upon the public lands of the United States, and the issuance to him of a patent therefor by the United States.

Under the third section of the act of congress of March 14, 1880, chap. 89 (21 stat. 141), it is provided that "any settler who has settled or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land-office as is now allowed to settlers under the preëmption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preëmption laws."

In *Larsen v. The O. R. & N. Co.*, decided at the present term, it was held, in effect, that a settlement made by a homestead claimant upon the public lands of the United States and compliance with act of congress on the subject, segregated the same from the public lands and cut off intervening claims, and such is the ruling of the land department of the United States.

Since the announcement of the opinion in *Larsen v. The O. R. & N. Co.*, *supra*, this case was argued, and our attention has been called to the recent opinion of the supreme court of the United States in *Steers v. Beck*, 10 Fed. R. 350.

The opinion of the court in that case is very exhaustive, and fully and conclusively settles the legal question under

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consideration adversely to the appellant. In that case the identical question, in principal, involved here was presented, and it was held that a homestead claimant's riparian rights attached from the date of his settlement, provided he complied with the law and obtained a patent for the land, and that when such patent was issued it related to the date of settlement and cut off the right to divert a stream of water running through such homestead. But the plaintiff claims to have the superior right to this water, and he seeks to prove title to the same in two ways: first, through an ex-sheriff's deed offered in evidence purporting to convey certain ditches and water rights of Hinckler to A. J. Lawrence; and, second, by prior appropriation and adverse possession of the water for more than ten years.

(2) These claims will therefore be examined. The deed of ex-Sheriff Boyd, of Baker county, is dated the twenty-fourth day of April, 1877. The deed recites that the execution upon which the sale was made was tested the thirtieth of May, 1866, on a judgment rendered the same day by the circuit court of the State of Oregon for Baker county in favor of Louis Pffefferberger & Co. and against Christain Hinckler. The date of the levy is not recited in the deed, but it is recited that the sale was made on the seventeenth day of September, 1874, more than eight years after the date of the execution. The amount of judgment is not mentioned, but the deed recites that the sum of \$300 was realized upon the sale, and it is stated that the sale was confirmed on the thirteenth day of October, 1875. After reciting the sale of the two ditches running through Hinckler's homestead, before referred to in this opinion and numbered one and two, the deed undertakes to convey the same to A. J. Lawrence. The respondent takes several objections to this deed; one is, that no judgment was offered in evidence, and therefore it is not shown that the execution recited in the deed was legally issued. An execution, regular upon its face, emanating from a court of competent jurisdiction, will

protect an officer who obeys it; but the rule is different when a purchaser claims under an execution sale. In such case it is well settled that a person seeking to recover property, and basing his claim upon an execution sale, must prove the judgment upon which the writ issued. 2 Freeman on Ex., § 850; *McRae v. Daviner*, 8 Or. 63.

(3) It is next objected that the execution at the time of the sale was dead in the hands of the ex-sheriff; that the official life of the sheriff had terminated, and that the writ by lapse of time had ceased to be of any validity for any purpose whatever. This objection must also prevail. By section 278, Hill's Code, an execution is returnable within sixty days after its receipt by the sheriff to the clerk's office from whence it issued; and by section 293 this time may be enlarged thirty days by the consent of the plaintiff endorsed upon the writ. In this case it does not appear that the officer had made a levy under the execution while it was still in force. The sole question, therefore, is whether or not a sheriff may hold an execution until long after the return day and until his term of office has expired and then make a levy and sale. No authority was cited upon the argument to uphold such a proceeding, and I think none can be found. On the contrary, such a writ is *functus officio* and confers no authority whatever, and any attempted levy and sale by virtue of it are nullities. Freeman on Ex. §§ 58, 106; *Lehr v. Rogers*, 3; *Smedes & Marsh*, 468; *Kane v. Preston*, 24 Miss. 133; *Dale v. Metcalf*, 9 Penn. St. 108; *Cash v. Tozier*, 1 Watts & S. 519.

(4) Another difficulty presents itself. The two ditches dug by Hinckler, and which are claimed to have been sold by virtue of this execution, were dug mainly through his homestead. One was used exclusively to irrigate his land, and the other also after a small placer mine had been worked out. Without the use of this water upon the land it would be of but little value and could probably never have been occupied as a homestead or for any agricultural or horticultural purpose. I think, therefore, that we must treat the ditches and the water in them flowing over this

homestead and used for the purpose of irrigating it as a part of the land itself and not severable therefrom. In such case the homestead is exempt from liability for debts contracted prior to the issuing of the patent. *Clark v. Bayley*, 5 Or. 343.

(5) Finally, it is objected that an ex-sheriff has no power in this State to make a deed to property sold on execution. This question appears to have been considered by this court in *Moore v. The Willamette T. & L. Co.*, 7 Or. 359, in which the conclusion was reached that the sheriff in office at the time the certificate is produced and the deed demanded, is the proper officer to make the deed, and not the one who made the sale and whose term of office has expired. The plaintiff does not use or seek to use either one of the Hinckler ditches described in this ex-sheriff's deed, and so far as I can see the only object of its introduction was to extinguish Hinckler's right to the water flowing in his ditches and to transfer the title to the water as severed and separated from the land to the plaintiff by mesne conveyances from Lawrence. In other words, it is claimed that by this deed Lawrence acquired this right to the water and that he or his successors in interest might lawfully divert it into other ditches and take it for their own use and benefit, and that Hinckler's right to the water, whether as riparian owner or first appropriator, thus become vested in Lawrence and his successors in interest. If there were no valid objection to the deed, and the land and water where it flowed had been subject to levy and sale, I doubt very much whether the results claimed by the appellant would have followed. What Lawrence claimed to have acquired by that sale were the ditches across Hinckler's land and the water in them. I do not see how it gave him any right to the water before it entered the ditches or conferred upon him the right to go higher up the stream and there dig ditches of his own and take the water out at another and different place. But it is unnecessary to decide this question for the reasons already indicated.

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(6) The remaining question is whether or not the plaintiff and those under whom he claims had acquired a title to this water by adverse user prior to the commencement of this suit? Did the plaintiff and those under whom he claims have such open, exclusive, notorious and continuous adverse use of this water as to bar the rights of the defendant either as riparian owner or first appropriator of it? On this subject I have carefully read all of the plaintiff's evidence two or three times, to ascertain the real foundation of his claim, and it all rests on the ex-sheriff's deed to Lawrence. One Davis claims to have been in possession of the water in Hinckler's ditches as Lawrence's tenant and he delivered possession to Tarter & Huffman, from whom the plaintiff seeks to deraign title; but the possession was never exclusive and it was not continuous. Hinckler, as long as he lived, firmly asserted his right to this water against all claimants, and maintained it with so much firmness that he lost his life in a difficulty with Davis growing out of the disputed claims to the water now in controversy. Giving full effect to the evidence on each side, and it appears that for several years no one had the exclusive use of the water; sometimes one was using it and then another, but the possession of none of the claimants was continuous or of such a character as to constitute *adverse possession* against the others. It was intimated on the argument by the appellant's counsel that the water in controversy ought equitably to be divided between the parties; but I am unable to find in the evidence anything whatever upon which a division might properly be made.

Finding no error in the decree of the court below, it must be affirmed.

Per Curiam.

[Filed March 5, 1880.]

*GEO. W. RIDDLE, RESPONDENT, v. H. B. MILLER,
APPELLANT.

ATTACHMENT—LEAS—BONA FIDE PURCHASER.—(1) The intention of the legislature in adopting the several provisions of the statute (Hill's Code, §§ 150, 151, 271,) was to give a creditor under an attachment, judgment or execution the same standing in regard to his right in or to the property affected thereby which he would gain by a purchase of the property from the debtor.

(2) A creditor who attaches the land of his debtor or obtains and docketts a judgment against him, who is at the time informed of an outstanding equity or of facts sufficient to put him upon inquiry, takes his lien subject and subordinate to such equity.

(3) Where the equitable right is superior to the legal right, its establishment in a court of equity becomes paramount to the legal right established in a court of law.

PETITION FOR REHEARING.—This was an appeal from the circuit court of Josephine county. Upon the hearing the court announced its decision as follows: "The only question of law arising upon this record we considered and decided in *Wood v. Rayburn*, 18 Or. 3. We see no reason to depart from the conclusions there announced. After a careful examination of the evidence, we have reached the same conclusions that the court below did. We do not think a particular examination of the facts disclosed by the evidence is necessary. The decree appealed from must therefore be affirmed."

Counsel for appellant subsequently filed a petition for a rehearing.

A. H. Tanner, for Appellant.

P. P. Prim and Davis Brower, for Respondent.

PER CURIAM.—The counsel for the appellant herein, in his petition for a rehearing, has suggested certain propositions which he claims have a bearing upon the merits of his appeal, and which did not appear, from the opinion of the court rendered, to have been considered. The first proposition is as to the effect to be given to section 150 (supposed to have been intended 271) and subdivision 4, section 283, Ann. Code. Said section 150 provides that,

*NOTE.—This opinion should have appeared in 18 Or. 460, but was omitted by mistake.—REPORTER.

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"from the date of the attachment until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith, and for a valuable consideration of the property," etc. Section 271 provides: "A conveyance of real property or any portion thereof or interest therein shall be void as against the lien of a judgment unless such conveyance be recorded at the time of docketing such judgment or the transcript thereof, as the case may be, or unless it be recorded within the time after its execution provided by law, as between conveyances for the same real property." Subdivision 4 of said section 283 provides "that property shall be levied on in like manner and with like effect as similar property is attached, as provided in section 149 * * * and 152 * * * omitting the filing of the certificate provided for in section 151."

The intention of the legislature in adopting these several provisions of the statute was to give the lien creditor under an attachment, judgment or execution, the same standing in regard to his right in or to the property affected thereby which he would gain by a purchase of the property from the debtor, so that in case the debtor had, prior to the levy of the attachment or execution or the docketing of the judgment, executed a deed of conveyance of it, if real property, and the deed were not recorded, as provided in sections 3023, 3024, Ann. Code, within five days thereafter, it would be void as provided in section 3027, Ann. Code. Under the said provisions the lien of the creditor may attach to property rights which the debtor has in fact conveyed away by deed good as between him and his grantee; while under the law as it existed prior to their adoption by the legislature a creditor would only acquire by virtue of such levy or of the docketing of the judgment a lien upon the actual interest which the debtor had in the property at the time the attachment or execution was issued or judgment docketed. The statute has materially enlarged the creditor's right under the proceedings, in the manner indicated; but the legislature did not

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intend thereby to give to a creditor, by virtue of such levy or the docketing of a judgment, any right as against an outstanding equity known to him at the time his lien attached. Acts of that character have always been construed as giving to a creditor, under such circumstances, such rights only as he would acquire under a voluntary sale of the property to him by the debtor for a valuable consideration. They operate to cut off the equities of third persons in the property, where the proceeding under them is taken and perfected without any knowledge of such equities. In the latter case, the equities between the parties being equal, the law prevails; but where a creditor resorts to such a proceeding who is informed of the outstanding equity, or of facts sufficient to put him on an inquiry by which he could ascertain the existence of such equity, the lien he secures thereby will be subject to it. This view has been sustained by two decisions of this court. *Stannis v. Nicholson*, 2 Or. 332, and *Baker v. Woodward*, 12 Or. 12, 13, also by the circuit court of the United States for the district of Oregon, in *U. S. v. Griswold*, 7 Saw. 332. Those cases refer more directly to a construction of said section 271, Code, but they apply with equal force to said section 150. The second proposition presented in the petition, "that respondent has lost his right to equitable relief by his own laches and negligence," is not, in our opinion, maintainable from the facts and circumstances of the case. We think the evidence shows clearly that at the time the lot in suit was attached at the suit of the appellant, he had at least sufficient notice of the respondent's rights in the lot to put him upon inquiry. The third proposition, that the decree of the court below should be so modified as to allow the appellant to recover the costs and disbursements awarded him in the action of ejectment, and the fourth one, "that the said decree should be further modified so as to require the respondent Riddle to pay appellant's judgment against Royal as a condition to the relief prayed for," are untenable. The principle which governs in such cases is that the equitable right is

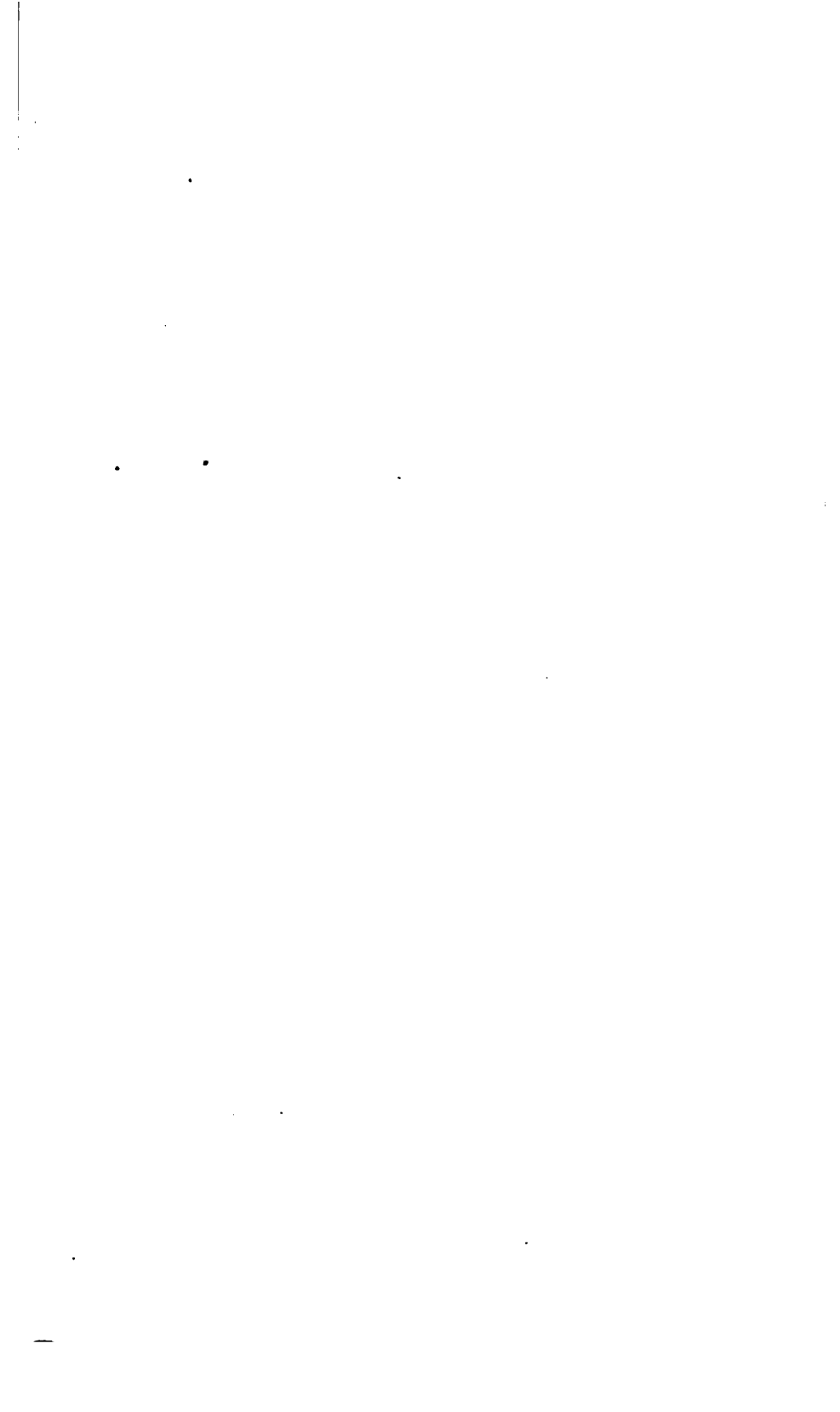
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superior to the legal right; that the establishment of the latter in a court of law is conclusive of the rights of the parties in that forum, while the establishment of the former in a court of equity becomes paramount thereto. The appellant herein is presumed to have had an unconscionable advantage of the respondent, and to have attempted its enforcement in the legal tribunal, in which the latter was unable to interpose his equity as a defense. He therefore resorted to the equity branch of the court in order to assert it and arrest the proceeding of the appellant. The court, sitting as a court of equity, heard the respondent's complaint, and said to the appellant, in effect: "Desist from further proceeding in the matter, as your course is inequitable and unjust." Now, if the court after saying this, were to say to the respondent, "but you must pay the appellant the costs of his wrongful proceeding," it would be highly absurd.

The petition for a rehearing will be denied.



OCTOBER TERM, 1890.



CASES
ARGUED AND DETERMINED IN
THE SUPREME COURT
OF
OREGON,

OCTOBER TERM, 1890.

[Filed October 20, 1890.]

DANIEL SONNEBORN, APPELLANT, v. THE PORTLAND
AND VANCOUVER RAILWAY COM-
PANY, RESPONDENT.

NOTICE OF APPEAL—ASSIGNMENT OF ERROR.—The notice of appeal must contain a specification of the errors upon which the appellant intends to rely upon the appeal. *Swift v. Mulkey*, 17 Or. 532, approved and followed.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

This is an action to recover damages for negligence. The complaint alleges, in substance, among other things, that heretofore, on the fourteenth day of October, 1888, the plaintiff David McMillan and one John Antone had charge and possession of a certain steam saw, used for sawing cord wood into proper lengths to suit customers, and that said defendant, its superintendent, agents and servants, then and there requested the plaintiff and his associates to move their said steam saw up to a certain pile of cord wood, located on the line of said railway within a few feet of the track of said railway, in front of the first block of land south of Monk's grocery store in

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the town of Albina, on Margretta avenue, and then and there requested the plaintiff and his said associates to set up said steam saw between said wood pile and the track of said railway and to saw wood enough and sufficient for the use of the engine and cars that defendant was then and there operating on said railway that day; and that in pursuance of said request the plaintiff and his said associates did move said steam saw up to said wood pile, and did set up said steam saw at the place aforesaid, and that it was ascertained by the plaintiff and his associates before and at the time said steam saw was placed in position, that by moving in the engine and train of cars that defendant was then operating on said railway, slowly, cautiously, and in a careful manner in passing said steam saw, said engine and train of cars would pass without touching said saw or in any wise interfering with said saw or any of its attachments or the plaintiff or his associates, and it was then and there agreed between the plaintiff and the defendant that the said train of cars in passing said saw should slow down and pass said saw in a slow, cautious and careful manner, and would take on wood near said saw, and that at Munk's grocery store, about one block distant from said saw, said train would stop to take on and let off passengers in going each way, and plaintiff and his associates were then and there assured by the defendant, its agents and servants, that said train would stop at Munk's grocery store and pass said saw in a slow, cautious and careful manner; that plaintiff relied upon said agreement and representations and commenced sawing wood until said train passed said saw three times safely as agreed upon; but the plaintiff avers that on the return trip from Vancouver, and being the fourth time that said train passed said saw, the defendant, its agents and servants, disregarding said agreement and assurance, carelessly and negligently moved said train at a high rate of speed and passed Munk's grocery store and said saw without stopping, and did not slow down or slacken the speed of said train, and did not pass the plaintiff's said saw slowly or in

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a cautious or careful manner, but did pass Munk's grocery store and said saw at a high rate of speed, which caused said train and cars to oscillate upon said track, and to sway back and forth, and that in passing said saw the crossbeams and stake boxes and seats on the flat cars attached to said train swayed over and struck against the shaft of said saw, which was then in motion, and struck said shaft and knocked the same and said saw and gearing out of line and caused said saw to break in pieces, some of the pieces of which were forced and thrown against the plaintiff's right leg below the knee and instantly cut it off. Other personal injuries are also alleged. It is then alleged that defendant's road was not properly constructed, but was constructed in a careless and negligent manner. The plaintiff then alleges with greater particularity how said train was made up, the width of the cars and coaches causing the collision already set forth. After alleging many other particulars not necessary to be specially noticed, the plaintiff claims damages in the sum of \$15,000.

The defendant's answer denied the material allegations of the complaint, except that it owned the road and operated the cars.

A trial before a jury resulted in a verdict and judgment in favor of the defendant, from which this appeal is taken.

The appellant's notice of appeal contains the following assignments of error :

"First—That the evidence is insufficient to justify the verdict.

"Second—That the verdict is against law.

"Third—That the court erred in his instructions to the jury.

"Fourth—That said instructions are against law.

"Fifth—That said instructions were misleading to the jury.

"Sixth—That said instructions are contrary to the testimony taken at the trial.

"Seventh—That the court erred in overruling the plaintiff's motion for a new trial."

Points decided.

C. B. Bellinger, for Respondent.

Jones & Stewart and *E. O. Doud*, for Appellants

STRAHAN, C. J., delivered the opinion of the court.

Upon the trial here all of the assignments of error were abandoned except the third, fourth, fifth, and sixth, which relate to the supposed misdirection of the court in charging the jury. Several pages of instructions are copied into the bill of exceptions, but the assignments of error contained in the notice are not sufficiently explicit to enable us to know from an inspection of the record upon what particular errors counsel for appellant intend to rely. None are pointed out by the notice of appeal, and these assignments of error may relate to any exception to the charge contained in the record. This court has many times held such assignments to be too general to raise any question for review on appeal. The latest expression on that subject is *Swift v. Mulkey*, 17 Or. 532, which is decisive of this case.

We could not enter upon an examination of the alleged errors in this record without setting at naught all of the precedents in this court on that subject. The practice is too firmly established to be disturbed. It is perhaps hardly necessary to say that new trials being in the discretion of the trial court, their rulings on motion upon that subject present no question for review here.

It follows that the judgment appealed from must be affirmed and it is so ordered.

[Filed October 20, 1894.]

STATE OF OREGON, RESPONDENT, v. HERMAN
LEWIS, APPELLANT.

EMBEZZLEMENT—PROOF OF OTHER ACTS TO SHOW GUILTY INTENT—INSTRUCTION.—In a prosecution for embezzlement, where evidence is admitted tending to prove other acts of embezzlement from the same parties about the same time as the one charged in the indictment for the sole purpose of showing guilty intent, the court must limit the effect of such evidence to such purpose by instructions to the jury.

Statement of facts.

APPEAL from Multnomah county: L. B. STEARNS, judge.

The defendant was indicted and convicted of the crime of embezzlement, from which judgment this appeal is taken. The charging part of the indictment is as follows: "That said Herman Lewis, on the twenty-first day of January, A. D. 1890, in the county of Multnomah, and State of Oregon, was the agent of J. Baumgarten, Godfrey Fisher and A. L. Brown, co-partners doing business under the name and style of J. Baumgartner & Co., and Solomon Reiss, Isaac Reiss, Achille Reiss, co-partners doing business under the name and style of Reiss Bros. & Co., and as such agent he did receive and take into his possession and have under his care and control by virtue of his said employment as such agent the sum of \$94 lawful money of the United States of America, the number and denominations of which said money is unknown to the grand jury, of the value of \$94, and of the moneys of the said firm of J. Baumgarten & Co. and Reiss Bros. & Co., composed as aforesaid, and having said money in his possession as aforesaid, he, the said Herman Lewis, did then and there fraudulently and feloniously take, secrete and embezzle and fraudulently convert to his own use said sum of \$94 with intent to embezzle the same."

On the trial in the court below the State gave evidence tending to prove that on the twenty-first day of January, 1890, the defendant receipted to one H. L. Clemens for \$94 on account of J. Baumgarten & Co. and Reiss Bros. & Co., and that said sum of money had never been accounted for by him. A. L. Brown was also called as a witness on the part of the State, and after testifying as to who composed the firm of Baumgarten & Co., the district attorney asked him to state whether he had examined the books kept by the defendant and whether he had discovered any other acts of embezzlement or defalcation by him committed. To this question counsel for the defendant objected for the reason that the same was irrelevant, immaterial and incompetent and related to matters not charged in the

Statement of facts.

indictment and was not the best evidence. When these objections were made the district attorney stated that his purpose was to make proof of these circumstances in order to show a criminal knowledge and intent on the part of the defendant to negative the inference that his conduct in relation to the \$94 was accidental and compatible with honesty. Thereupon the court overruled the defendant's objections and admitted the evidence for the purpose suggested by the district attorney. The witness then testified that the cash book and ledger were in his hand writing and were under his control, and that there appeared on said ledger in defendant's hand writing items showing the receipt by him of six different sums of money from six different persons, aggregating \$300 due said firm; that none of these items appeared upon the cash book, and that the defendant had failed to account for any of them to said firms, and that said ledger showed that these receipts were all before January 21, 1890, and after November, 1889.

The defendant then introduced evidence tending to prove that at the time he made the receipt to Clemens for \$94 he received no money, but that in fact Clemens deeded to him a lot valued at \$80 and agreed to pay for defendant a drug bill of \$14 which he owed at a drug store in town. It did not appear whether Clemens had in fact paid the drug bill or not. At the conclusion of the evidence, counsel for defendant asked the court to charge the jury as follows:

1. If the jury believe under the evidence that the defendant never received the \$94, but merely got the benefit of it in real estate or in an account, he cannot be convicted. The specific money must have come into his hands, no matter how fraudulent was his act. No matter what breach of trust may have been committed, to convict of this charge, the money must have come into his hands actually, not constructively. If you believe the evidence of the witness Clemens, he cannot be convicted.

2. The law requires that the defendant should have

Opinion of the Court—Strahan, C. J.

received into his possession the specific money described in the indictment, as fiction in criminal law is not permitted. Therefore if you believe the evidence of the witness Clemens he cannot be convicted. The circumstances of other embezzlements can only be considered as determining guilty knowledge and intent.

These instructions were refused by the court, but he charged "that if upon the twenty-first day of January the defendant had in his possession moneys which he had collected belonging to his employers, which he fraudulently converted to his own use, then he would be guilty of the crime charged in the indictment, no matter from whom such money was received; that the specific money must have come into his hands; no matter how fraudulent his act, no matter what breach of trust may have been committed, to convict of this charge the money must have come into his hands actually and not constructively."

To all of which rulings of the court the defendant severally excepted.

Alfred F. Sears, Jr., for Appellant.

No appearance for State.

STRAHAN, C. J., delivered the opinion of the court.

The only question presented by this appeal arises upon the refusal of the court to give the instructions requested by the defendant and in giving the one to which an exception was taken. They are all resolvable into a single question, and that is, whether or not it was competent for the State to rely for conviction upon the evidence given by the witness Brown in relation to other embezzlements than the particular one which was attempted to be proven by the introduction of the Clemens receipt for \$94, and we are all of the opinion that it was not. For the purposes of this case, it may be conceded, without deciding that other acts of embezzlement from the same parties might be shown for the purpose of proving guilty knowledge or intent, still such evidence, if received, must be

Points decided.

confined strictly to the purposes of its introduction and cannot be used to prove a substantive or independent crime. Wharton's Cr. Ev., § 46; *Mayer v. People*, 80 N. Y. 364; *Shipply v. People*, 86 *id.* 375; 40 Am. Rep. 551; *Pinckard v. State*, 13 Tex. App. 468; *Com. v. Shepard*, 1 Allen, 575.

In *Commonwealth v. Shepard*, *supra*, it was expressly held that another act of embezzlement committed by a defendant in the same week with one charged against him in an indictment, is competent only for the purpose of proving a guilty intent on his part in the commission of the principal act; and the admission of such evidence in a case which, after a verdict of guilty is reported by a judge of the superior court for the determination of this court, is sufficient ground for a new trial, if it does not appear that it was limited to its legitimate effect by instructions to the jury. The sole object of the instructions asked by the appellant was to limit the effect of Brown's testimony to the very purpose for which it was admitted by the court; but instead of limiting the effect of such evidence, the court thought proper to give an instruction broad enough to allow the jury to convict on evidence admissible solely for the purpose of proving guilty knowledge.

Such an instruction was manifestly erroneous and requires the reversal of the judgment and that the cause be remanded to the court below for a new trial, and it is so ordered.

[Filed October 20, 1897.]

G. B. BARTEL, RESPONDENT, v. NICHOLAS MATHIAS, APPELLANT.

CONTRACTS—WHEN SEVERAL.—Where an agreement embraces several distinct subjects which admit of being separately executed and closed, and the facts show that they were so separately performed, and the compensation agreed upon and apportioned to each of them, such an agreement is to be taken severally and a right of action accrued as to each of them when the services were rendered.

STATUTE OF LIMITATIONS—RIGHT OF ACTION.—The statute of limitations begins to run when the right of action is complete, and this being so, a right of action accrued upon each of these matters when the services were rendered and each transaction closed.

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Statement of facts.

PAYMENT—APPROPRIATION.—Where there are several of such distinct claims for services a payment appropriated upon each of them will interrupt the running of the statute of limitations.

FINDINGS—EFFECT OF.—The findings of a referee are conclusive as to the facts found if there is any evidence before him having a tendency to establish such facts.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

This was an action brought by the plaintiff for services as the general agent of the defendant on an agreement made about the first of April, 1878, to take charge of his property and business, and to act generally as such in the payment of his taxes and insurance, in procuring loans, in leasing and selling and caring for his property, etc.

The complaint alleges that the plaintiff fully complied with all the conditions of said agreement and that he forthwith entered upon such service, and remained in the employment of the defendant until about the first of September, 1883, when, with the consent of the defendant, he left his service and discontinued to labor for him. The complaint is accompanied with an account, containing an itemized bill of said services and payments in detail, which is made a part thereof, etc. The answer puts in issue the material matters alleged, except as to several items. It alleges payment as a defense for all services performed therein, and concludes with the further defense that the right of action as to each and all of said items, etc., did not accrue within six years prior to the commencement of this action, etc.

The reply denies the new matter set up, and alleges affirmatively that the sums paid by the defendant were a part payment of plaintiff's entire claim, and that plaintiff's right of action did accrue within six years prior to the commencement of this action, and denies that they are barred by the statute of limitations, etc.

The issues being thus joined, the cause was by consent referred to a referee to take the testimony, and to determine the issues of fact and the conclusions of law involved. After hearing the testimony and being fully advised in the premises, the referee found:

Statement of facts.

First—"That in the month of February, 1878, plaintiff and defendant entered into an oral agreement that plaintiff should act as the general agent of defendant, take charge of his property and business, * * * etc.

Second—"That at the time of making such agreement there was no rate of compensation agreed upon between the plaintiff and defendant for such services so to be performed by plaintiff for defendant, and that no time was fixed for the performance or ending of such agency, or for payment for services rendered thereunder.

Third—"That after entering into said agreement, and during said month of February, 1878, plaintiff entered into the service of defendant as his general agent, pursuant to said agreement, and continued in and performed the duties of such agency continuously from February, 1878, to and including February, 1883.

Fourth—"That during the continuance of such agency, plaintiff paid out of his own funds for the benefit of defendant in the management of his property and business the full sum of \$384, exclusive of taxes and insurance, prior to November 20, 1882.

Fifth—"That the reasonable value and compensation for plaintiff's services in such agency performed during said term in attending to payment of taxes, insurance and leasing property, time and expenses in traveling and in correspondence with defendant and expenses incident thereto, was and is \$283.

Sixth—"That during the term of such agency, at the request of the defendant, plaintiff effected and procured for the defendant three several loans for money, for which it was then agreed that the defendant should pay the plaintiff \$100 in each case, and that the sum thereof is \$300.

Seventh—"That during the term of such agency, at the request of defendant, plaintiff procured a purchaser for and effected a sale of block 99 in East Portland for defendant, and it was then agreed by them that the plaintiff should have for his services therein \$300, and the

Statement of facts.

defendant gave a note or memorandum thereof in writing to plaintiff for said sum.

Eighth—"That during the term of such agency, at the request of defendant, plaintiff procured a purchaser for blocks 4 and 19 in East Portland at a price and sum for which the defendant desired to sell the same; and that the defendant then agreed to pay plaintiff for his services in procuring such purchaser \$600, and defendant gave a note or memorandum in writing to plaintiff for said sum.

Ninth—"That in the month of July or August, 1883, the plaintiff informed the defendant that he had lost the two several notes hereinbefore found to have been given by the defendant to the plaintiff. And it was thereupon agreed between said parties that the amount of money represented by said notes should stand upon the defendant's liability to pay said amount disregarding the evidence of said notes. And thereafter, by the mutual understanding of said parties, said amount of moneys represented by said notes, together with all demands existing between them, stood as an open account between said parties.

Tenth—"That on November 20, 1882, a settlement was made between plaintiff and defendant for all advances of money at and prior to said date made by the plaintiff for the defendant in payment of defendant's taxes and insurance and otherwise.

Eleventh—"That payments have been made on general account hereinbefore found, as shown by findings 4, 5, 6, 7, 8 and 9, at times in the amounts and manner as follows: 1879, paid by defendant, \$25; September 6, 1879, paid by J. Paquet for defendant's account, \$25; July, paid by defendant in person, \$10, thereafter \$1; July 17, 1887, paid by defendant in person, \$50, and that no other payments have been made.

Twelfth—"That no settlement or accounting has been made between the plaintiff and defendant touching the matters of account involved in this action save as found in finding 10 above.

Thirteenth—"That the balance of said account due and

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owing to plaintiff by defendant, after deducting all payments made thereon, is the sum of \$1,756; and as conclusions of law, that plaintiff is entitled to recover of and from the defendant \$1,756, and to have judgment therefor against the defendant.

(Signed)

“JOHN H. WOODWARD, referee.”

Upon motion of the defendant to set aside the report and findings of the referee, the cause was tried before the circuit judge, and the said report in all respects confirmed, and a judgment directed to be rendered in favor of the plaintiff for the sum of \$1,756 and costs and disbursements, in conformity with the recommendation and finding of the referee.

From this judgment the defendant has brought this appeal to this court.

A. S. Bennett, for Defendant.

A. F. Sears and *W. W. Thayer*, for Plaintiff.

LORD, J. (after stating the facts), delivered the opinion of the court.

The items of plaintiff's claim for services under his alleged contract extend from the year 1878 to 1883, and as this action was commenced in 1889, unless the payment of \$50 found by the referee to have been made in July, 1887, was a part payment of all such indebtedness embraced in such items, it is not disputed that the claim is barred by the statute of limitations. For the plaintiff it was argued that his whole claim was based on an entire contract and that the statute of limitations did not begin to run until the completion of his services under the contract, and that the payment of the \$50 at the time alleged was necessarily a part of the entire claim for such services as sued upon and precluded the operation of the statute. On the other hand, the contention was that the facts as found from the evidence show that the claim consists of several distinct and separate items for services which were rendered at different times and in respect to different

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subject matters, and that the price to be paid was agreed upon and apportioned to each item when the services were to be performed, and that when so performed were fully complete and ended as to each item, constituting in themselves distinct and independent transactions upon which a right of action then accrued, so that when the \$50 was paid, there being several specific debts, unless there was specific reference to or an appropriation upon each of them, the payment was a general payment and would not interrupt the running of the statute. It is no doubt true that there are cases which hold to the effect that where there is a long-continued service performed by one person for another, and no time of payment or term of services being stipulated, and small payments have been made from time to time to apply upon the balance due, the services are deemed to be continuous, and a payment made within six years renews the whole claim for the previous services. In *Smith v. Velie*, 60 N. Y. 111, Grover, J., said: "The proof shows that the intestate let the plaintiff have, in every year, various sums of money and different articles of goods, of which he kept an account against her, which was to apply upon her wages. Whenever he did this, her services being continuous and no time fixed by agreement for the payment of any part, the presumption is that it was to apply upon the balance he at that time owed her and not upon the wages of any particular year. Indeed, I think the claim of the plaintiff, at any and all times for previous services, was an entire account and that she could have maintained but a single action thereon against the defendant; that she could not maintain a separate action for each year of services, or any other specified part, after all had been rendered. A payment by the intestate upon the balance due the claimant took the entire balance out of the operation of the statute."

In *Littler v. Smiley*, 9 Ind. 117, it was held that upon an account for work and labor done under an agreement for payment without specifying at what time such payment should be made, or how long such labor should be per-

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formed, that the statute of limitations would not commence running until such labor was ended. But in *Davis v. Gorton*, 16 N. Y. 255, 69 Am. Dec. 694, where the services were performed under a general retainer without any agreement as to the time or measure of compensation, or the term of employment, it was held to be a general hiring from year to year, the pay for each year's service becoming due at the end thereof, so that the statute begun to run on each year's wages from the end of each year. See also *Matter of Garner*, 103 N. Y. 535; 57 Am. Rep. 768; *Mosgrove v. Golden*, 101 Pa. St. 605; *Mims v. Sturtevant*, 18 Ala. 359. But the case at bar differs in essential particulars from those referred to, and to which our special attention has been asked, and that the agreement here embraces a number of distinct subjects, all of which admit of and were separately executed and closed, constituting in themselves several and independent transactions, and for which the price to be paid for the services rendered was agreed upon and apportioned to each of such subjects. Such a case is not like a general hiring for services, as a farm-hand or house-keeper, etc., although no rate of compensation as wages nor term of employment is stipulated.

In the nature of things it would be difficult to fix the time of performance or rate of compensation for services to be rendered in respect to the various and distinct subjects embraced in the claim or agreements, and the facts as found from the evidence show that these subjects were mainly separately executed and closed, indicating that they were several and independent transactions. Take the claims for commissions for the sale of real estate or for procuring loans. It is incontrovertible that they were all severally executed and closed at different times and for a price agreed upon and apportioned to each transaction. The first item in the itemized bill filed by the plaintiff as part of his complaint is as follows: "February 7, 1879. To selling block 99 to John Kraus for \$2,600, commissions as per contract, \$300." The facts as found by the referee show that, at the request of the

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defendant, the plaintiff procured a purchaser and effected a sale of that block, and that it was then agreed that the plaintiff should have for his services therein \$300, and gave him a note or memorandum in writing for that sum. The same is true for the services rendered in respect to blocks 4 and 19 and for procuring three different loans of money, except as to giving the note, but for which the price was apportioned to each transaction at the time services were performed. These were all subjects embraced within the agreements, but which were separately executed and closed, and the amount to be paid agreed upon and apportioned to each one of them. Such contract is not entire but severable, and a right of action accrued when such services were rendered and ended. It is a familiar principle that the statute of limitations begins to run when the right of action is complete, and this being so a right of action accrued upon each of these matters when the services were rendered and the transaction closed.

The claims being thus several and distinct, the contention for the defendant now is that the payment of the fifty dollars was a general payment and not a payment to be applied in part payment of these several items found by the referee, and consequently did not prevent the running of the statute. But the findings show that the latter part of the year 1882 there was a settlement between the plaintiff and the defendant for all advances of money at and prior to that date made by the plaintiff for the defendant in payment of the defendant's taxes and insurance and otherwise; that subsequently in August of 1883 the plaintiff informed the defendant that he had lost the two several notes given by the defendant to him, and that it was thereupon agreed between them that the amount of money represented by these two notes should stand upon the defendant's liability to pay them without regard to the evidence of said notes, and that thereafter by the mutual understanding of the parties the said amount of moneys represented by said notes, *together with all demands existing between them*, should stand as an open account between the plaintiff and the

Opinion of the Court—Lord, J.

defendant. These facts tend to indicate that after the elimination of all matters included in the settlement, there was a mutual understanding reached, not only as to the moneys represented by the notes and the liability therefor, but that there were other existing demands of the plaintiff against the defendant, all of which were to be deemed and treated as an open account. Distinct as they may have been, the claims were recognized as existing, although unsettled. The evidence also tends to show that at the time the fifty dollars was paid by the defendant that he thought that the aggregate of these several items was about twelve hundred dollars, and not so much as the plaintiff claimed, which tends to show that he knew of and recognized the existence of these several claims, and had considered them in the aggregate, only differing as to the gross amount of his indebtedness upon them. This amount as computed by him is much greater than the largest amount in any one item, and exceeds all the others aggregated without it, which tends to indicate at least that when the fifty dollars was paid, that the defendant knew and understood that he was not making a part payment on any specific item, but that he was considering all the claims in the aggregate, and intended it to be applied in part payment of them all, or, in other words, for the whole service performed, represented by these several claims considered in the aggregate. The referee finds that the payments made, including the fifty dollars in July, 1887, were made and to be applied upon these several claims, and specifies them by enumeration "as shown by findings 4, 5, 6, 7, 8 and 9," and finds that the balance due and for which the defendant is entitled to judgment is the sum of \$1,756. It is admitted that the findings of the referee are conclusive as to the facts found if there is any evidence before him having a tendency to establish such facts.

Such being the case, it matters not how much we might differ with the referee, if we were permitted to pass upon the facts, his finding is conclusive upon us and we have no other alternative than to affirm the judgment.

Statement of facts.

[Filed October 21, 1890.]

W. P. REAM, RESPONDENT, v. J. E. HOWARD,
APPELLANT.19 491+
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NOTICE OF APPEAL—WHEN INSUFFICIENT.—A notice of appeal which describes a judgment for the recovery of a specific sum of money is not sufficient to bring into the appellate court a judgment in an action for the recovery of specific personal property.

NOTICE OF APPEAL—WHEN SUFFICIENT.—A notice of appeal which gives the name of the court, and of the parties to the action, the date of the judgment, without any other description, and informs or makes known to the respondent that the appellant appeals from the judgment in said action, is sufficient.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

This action was originally commenced in the justice's court of East Portland, where the plaintiff had judgment, from which an appeal was taken to the circuit court. Upon respondent's motion the appeal was dismissed, on the ground of the insufficiency of the notice, from which last-named judgment this appeal was taken.

The verdict and judgment in the justice's court are as follows:

"In Justice's Court for East Portland Precinct, Multnomah County, Oregon.

"*W. P. Ream, Plaintiff, v. J. E. Howard, Defendant.*

"We, the jury in the above-entitled action, find for the plaintiff for the goods and chattels described in the complaint, or, if return cannot be had, for the value, to wit: \$80; and \$31 damages for the detention and withholding of the same from plaintiff.

"WASH F. ALLEN.

"S. F. WISHARD.

"R. MERRICK.

"W. H. H. GRANT.

"JAMES POWELL.

"It is therefore ordered that the defendant deliver to plaintiff the goods and chattels named in the complaint, and the sum of \$31 damages for the detention of goods, and the costs and disbursements, taxed at—justice's fees,

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\$7.90; constable, \$8.45; witnesses, \$11.60; notary fees, \$3, and that execution issue therefor."

The notice of appeal is as follows:

"In Justice's Court for East Portland Precinct.

"STATE OF OREGON, }
"County of Multnomah. } ss.

"Notice of Appeal.—Civil Action.

"*W. P. Ream, Plaintiff, v. J. E. Howard, Defendant,*

"To W. P. Ream and to Messrs. Doud & McCoy, his attorneys: Please take notice that the defendant in the above-entitled action appeals from the judgment rendered therein on the eleventh day of April, A. D. 1890, in favor of the said plaintiff and against the said defendant for the sum of one hundred and forty-one dollars and ninety-five cents and costs, and from the whole of said judgment, to the circuit court of the State of Oregon, for the county of Multnomah.

C. J. McDougall,

"Attorney for Defendant."

C. J. McDougall, for Appellant.

Doud & McCoy, for Respondent.

STRAHAN, C. J., delivered the opinion of the court.

The tendency of all the recent decisions of this court on the subject of appeals is not to dismiss them if they could be retained for trial, for the simple reason that courts are established to hear and determine judicial questions and not to arbitrarily turn the parties out of court without the opportunity of being heard; but we cannot dispense with the necessary papers to bring an appeal into this court. In the construction of appeal papers we have applied the most liberal rule of construction and have allowed undertakings to be filed and papers supplied whenever we had the power to do so. But under any view of the subject, we think the judgment appealed from must be affirmed. If the notice of appeal had simply contained the title of the court, the names of the parties, the date of the judg-

Opinion of the Court—Lord, J.

ment, and had made known to the respondent that an appeal was taken from the judgment in that action, without any attempt to further describe it, the notice would have been sufficient. But here, the judgment is so entirely misdescribed that we must conclude that the appeal is from some other judgment than the one contained in this record. The judgment in the record is for the recovery of specific personal property, or its value in case delivery could not be had, together with damages for its detention, and costs and disbursements. The judgment described in the notice is for a specific sum of money. These discrepancies are too great to be reconciled according to any principle or authority. Counsel for appellant relies upon *Lancaster v. McDonald*, 14 Or. 264, but that case, neither in its facts nor reasoning, will sustain appellant's contention.

The judgment appealed from must be affirmed.

[Filed October 21, 1890.]19 493
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F. S. AIKEN ET AL., RESPONDENT, v. GEORGE PASCALL,
APPELLANT.

CHATTEL MORTGAGE—WHEN VOID AS TO ATTACHING CREDITORS.—When it appears either on the face of a chattel mortgage or by parol evidence that the mortgagee of personal property has given to the mortgagor power to dispose of the property mortgaged and to apply the proceeds to his own use, the mortgage is void as to attaching creditors.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

Sanderson Reed, for Respondent.

X. N. Steeves, for Appellant.

LORD, J., delivered the opinion of the court.

This is a suit for an injunction to restrain the defendant Kelly, as sheriff of Multnomah county, from foreclosing two chattel mortgages, one of which was made and executed by the defendant Chizzoski to the defendant Cominsky, and the other to the defendant Pascall, and also for the purpose of having said chattel mortgages

Opinion of the Court—Lord, J.

decreed void as to the plaintiffs in this suit. The facts show that the defendant Chizzoski was a retail shoe dealer, and had bought goods of the plaintiff, and by means of certain representations had procured a credit for their payment; that subsequently he executed contemporaneously the two chattel mortgages aforesaid for the sums, respectively, of \$1,500 and \$1,000, covering his stock of goods. As soon as the fact of these mortgages became known to his creditors, these plaintiffs attached the stock, when the defendants Cominsky and Pascall placed their chattel mortgage in the hands of the sheriff to be foreclosed. The plaintiffs then instituted the present suit, to have these mortgages annulled and set aside as fraudulent and void, and among other things upon the ground of a conspiracy between the defendant Chizzoski and the defendants Pascall and Cominsky, to cheat and defraud the plaintiffs out of the debts due them, etc. After the injunction was obtained a receiver was appointed to sell the goods, etc., and a supplemental complaint was filed. It seems that the defendant Chizzoski absconded the county immediately on the service of the summons upon him, and Cominsky soon after disappeared and made default, and a decree was entered setting aside his mortgage. It is conceded that the defendants Chizzoski and Cominsky have acted dishonestly and fraudulently in regard to the transaction, but it is claimed for the defendant Pascall that he took his chattel mortgage in good faith and for money loaned the defendant Chizzoski. The contention for the plaintiff is, (1) that the two mortgages were fraudulent in fact and without any consideration, and were prepared and designed to defraud the creditors of the defendant Chizzoski, and (2) that the mortgages were void in law for the reason that the defendant Chizzoski was allowed to remain in possession of the stock of goods with power to dispose of the same and to apply the proceeds to his own use.

While we do not intend to review these facts to any great extent, the result of their consideration as a whole has

impressed us with the conviction that the circumstances in which these two mortgages originated and were executed are permeated with fraud. It is impossible under the circumstances as detailed that the defendant Pascall should not have known that the purpose of these mortgages was to forestall and defeat the creditors of the mortgagor, and his narration of the circumstances, as to his own connection, leaving out of view some of its contradictory and improbable aspects, tends to confirm that impression. But aside from this, we are satisfied that the defendant Chizzoski was left in possession of the stock of goods with the power to sell them and receive the proceeds to his own use with the full knowledge and consent of the defendant Pascall. It is true that he testifies that he had an oral agreement with the defendant Chizzoski that he should not sell any of the stock, and that he kept some sort of a watch on the store to see that it should be observed. But the evidence shows that the defendant Chizzoski not only remained in the possession of the stock and in the use and enjoyment thereof, but that the store was open with the goods exposed for sale, as other stores doing business, and as he had carried on this business before, customers coming and going, and that some of the goods were actually sold and delivered. If he did as he testified, it is not possible for him not to have had some knowledge of these circumstances, and that the agreement was not kept, and as he makes no protest, but still permits his mortgagor to go on doing business as before, the inference is that he did it with his consent, and that it was understood that the mortgagor should treat the goods as owner, and sell them and receive the proceeds to his own use. Besides, the circumstances of his own statement show that he had little or no confidence in his mortgagor, and it is difficult to understand how in such a case he could have been induced to make the loan. To say the least, it shows that he distrusted him, if he did not in fact regard him as a rascal, as the evidence shows, and his counsel freely admitted, that his mortgagor was. This

Statement of facts.

circumstance is only referred to as illustrative of his testimony and to show its inherent unreliability. The taking of those mortgages at the time and under the circumstances of their execution, the conduct of the parties then and subsequently, and the facts as disclosed by the defendant Pascall, satisfy us that the object of those mortgages was fraudulent, and that it was understood that the defendant Chizzoski was to treat the goods as the owner, and to sell and to appropriate the proceeds to his own use. In *Orton v. Orton*, 7 Or. 479,¹ it was held that when it appears either on the face of a chattel mortgage, or by parol evidence, that the mortgagee of personal property has given to the mortgagor the power to dispose of the mortgaged property and to apply the proceeds to his own use, the mortgage is void as to attaching creditors.

It is enough to say there was no error, and the decree of the court below must be affirmed, and it is so ordered.

[Filed October 27, 1890.]

JOHANNA CASPARY, APPELLANT, v. THE CITY OF
PORTLAND, RESPONDENT.

PLEADING—EXHIBITS.—An exhibit may be made a part of a pleading by marking it so that it may be identified and reciting in the pleading itself that such exhibit is so marked and made a part of it, *either*, though filed with the pleading and numbered as schedule 1.

MUNICIPAL CORPORATIONS—WRONGFUL ACT OF OFFICER.—A municipal corporation is not generally liable for the wrongful act of an officer, and in the few cases where it may be liable, it must be made to appear that such officer was not an independent public officer, and that the wrong complained of was done by such officer while in the legitimate exercise of some duty of a corporate nature, which was devolved upon him by law or by the direction of the corporation.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

The only question presented on this appeal is the sufficiency of the plaintiff's complaint, which is as follows:

"Johanna Caspary and J. Octavia Caspary, Plaintiffs, v. The City of Portland, Defendant.

"Johanna Caspary and J. Octavia Caspary, the plaintiffs in this action, complain of the defendant herein and

(1) 88 Am. Rep. 717.

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Statement of facts.

for cause of action allege: That the defendant, the City of Portland, is a municipal corporation created by and existing under a law of the State of Oregon, entitled 'An Act to incorporate the City of Portland,' approved October 24, 1882, and acts amendatory thereof; that during all the times hereinafter mentioned the plaintiffs were and now are the owners of and entitled to the possession, in their own right, of all the personal property described in the following schedule No. 1, and that the same was of the value stated therein; that all times herein mentioned the plaintiffs were and now are entitled to the possession of the personal property described in the following schedule No. 2, as bailees for one Jos. Windle, and that it was all of the value stated in said schedule No. 2; that the defendant, the City of Portland, on or about the first day of November, 1888, unlawfully took and carried away all of the above-mentioned and described property, and unlawfully converted and disposed of the same to its own use, to the damage of plaintiffs in the sum of \$2,069.85; wherefore plaintiffs demand judgment against defendant for \$2,069.85, and for their costs and disbursements herein."

The name of the court, verification and signatures are omitted.

A demurrer was interposed, which was sustained, and final judgment rendered thereon, from which the plaintiff has appealed.

H. T. Bingham, for Appellant.

Omitting the fiction of casual loss by plaintiffs and the finding by defendant, the complaint in this action contains all the essentials of a declaration for trover and conversion, as given in *Chitty's Plead.*, Vol. 2, p. 835, *et seq.* In *Ramsby v. Beasley*, 11 Or. 50, this court has given various definitions of conversion. "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it." *Cooley on Torts*, 448. "It may be laid down as a general principle," says Mr. *Bigelow*, "that the assertion of a title to, or an act of

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dominion over personal property inconsistent with the right of the owner, is a conversion." Bigelow's *Lead. Cases on the Law of Torts*, 428; Hill on *Torts*, § 3, p. 97. So also in the case of *Budd v. Multnomah St. Ry. Co.*, 12 Or. 274, does this court define what is a conversion: "The wrong lies in the interference with the owner's right to do as he will with his own. Whosoever does this in any manner subversive of the owner's right to enjoy or control what is his own, is guilty of conversion." When the conversion is direct, as by an illegal taking of the chattel, or a wrongful assumption of property, or a misuse of it, the conversion is complete without a demand. *Gilmore v. Newton*, 9 Allen, 171; 85 Am. Dec. 747; *Alden v. Pearson*, 3 Gray, 342; *Paige v. O'Neal*, 12 Cal. 483; *Hexter v. Schneider*, 14 Or. 187; *Moorhouse v. Donaca et al.*, 14 Or. 430; *Ruiter v. Plate*, 77 Iowa, 17. An allegation in a complaint that defendant "converted" the property in question to his own use is an allegation of fact, and is sufficient; and the plaintiff is not bound to allege the particular act or acts which constitute the conversion complained of. *Burney v. Drexel*, 33 Hun, 34; 63 How. Pr. 474; *Green v. Palmer*, 15 Cal. 411; 76 Am. Dec. 492. It seems to us the complaint should have been held sufficient.

W. H. Adams, for Respondent.

1. The complaint does not state facts sufficient to constitute a cause of action. The schedules attached to the complaint are no part of the complaint, hence there is no description in the complaint of the articles which plaintiffs claim were appropriated to the use of the defendant, nor any allegation of their value. *Plunkett v. Black*, 117 Ind. 14; *City of Los Angeles v. Signoret*, 50 Cal. 298; *Brooks v. Paddock*, 6 Col. 36; *Buck v. Fischer*, 2 Col. 185; *Bowling v. McFarland*, 38 Mo. 465; *Gebhard v. Garnier*, 12 Bush, 325; 23 Am. Rep. 721; *Hill v. Barrett*, 14 B. Mon. 83.

2. The property converted must be described in the complaint with reasonable certainty. *Edgerly v. Emerson*, 23 N. H. 555; 55 Am. Dec. 207; *Pierson v. Townsend*, 2 Hill, 550.

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3. And the value must also be alleged. *Connoes v. Meir*, 2 E. D. Smith, 314; *Jones v. Rahilly*, 16 Minn. 320.

4. If the officers of the city acted unlawfully, the wrong is theirs and not the defendant's. *Everson v. Syracuse*, 100 N. Y. 577; *Jolly, Admx., v. Hawesville* (Ky.), 12 S. W. Rep. 313; *Mayor etc. of Jersey City v. Kiernan*, 50 N. J. L. 246; *Cushing v. Bedford*, 125 Mass. 528.

5. The city must have been authorized to act before it can be held liable for a tort. *Hawks v. Charlemont*, 107 Mass. 417; *Buttrick v. Lowell*, 1 Allen, 174; 79 Am. Dec. 721; *Anthony v. Inhabitants of Adams*, 1 Met. 285.

STRAHAN, C. J., delivered the opinion of the court.

To sustain the ruling of the court below, counsel for the respondent has argued two propositions in this court:

First—That the schedules mentioned constitute no part of the complaint, and that therefore the complaint contains no description of the property alleged to have been converted or statement of value; and,

Second—That the defendant being a municipal corporation, and necessarily acting through its officers, it ought to appear that at the time of the alleged wrongful acts the officers were engaged in the performance of some corporate act, or that the officer doing the act was not an independent public officer.

These questions will be examined in the order stated.

1. The facts constituting the plaintiff's cause of action must be alleged in the complaint. The appellant's counsel insists that taking the complaint and schedules referred to together, they do contain every allegation necessary. We think that must depend on whether or not the schedules constitute a part of the complaint. The schedules contain various items of personal property, and opposite each item are figures showing the value thereof; but they are in no way identified or marked as exhibits, nor is it stated in the pleading that they are attached or made a part of it. If these schedules had been marked so that they could be identified with certainty and then annexed

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to the complaint as a part thereof, and these matters had appeared in the complaint, we think, according to the constant practice in this State, they would constitute a part of the pleading, not for the purpose of supplying necessary allegations therein, but for the purposes of description and itemizing the values. It is true, some of the authorities cited by respondent's counsel hold that exhibits cannot be made a part of the pleading, but for the purposes above indicated the practice in this State has been otherwise, since the adoption of the Code, and we are unwilling to disturb it. But to make an exhibit a part of the record, it must be attached and identified, as in *Morrison v. Crawford*, 7 Or. 473. It is true in that case the exhibits were attached to a bill of exceptions, but as much certainly ought to be observed in the preparation of a pleading, and we can perceive no reason for a different rule. Counsel for appellant referred to section 83, Hill's Code, but I fail to see that that section has any application to the question presented by this record.

2. Numerous authorities are cited by counsel on the other question, but none of them seem to be identical with the question presented by this record. The complaint alleges the conversion of chattles by the defendant. Now, it is manifest that the defendant could only do the act, if at all, through some of its officers or agents. An individual is liable to a person injured for any wrongful act causing injury; but a municipal corporation is not liable for the torts of its officers or agents except under circumstances and conditions not necessarily applicable to an individual. In fact the liability of such corporation for the acts of its officers or servants is somewhat exceptional. 2 Dillon Munic. Corp. § 949, *et seq.* No general rule has been formulated on the subject, and it is said by some of the authorities that all the courts can safely do is to determine each case as it arises. Under the allegations contained in this complaint the court is unable to say whether the maxim of *respondet superior* applies to this case or not. The pleader has not seen proper to develop

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the facts of his case far enough to enable the court to determine that question. The plaintiffs' allegations assume it without averring a single fact upon which the assumption could properly rest. The best and latest authority on the subject says, in substance, that if the officers or servants are elected or appointed by the corporation in obedience to the statute to perform a public service, not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation for whose acts or negligence it is impliedly liable, but as public or State officers, with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* is not applicable.

It will thus be seen that on general principles it is necessary, in order to make a municipal corporation impliedly liable on the maxim of *respondeat superior* for the wrongful acts or negligence of an officer, that it be shown that the officer was its officer, either generally or as respects the particular wrong complained of and not an independent public officer; and also that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved on him by law or by the direction or authority of the corporation. 2 Dillon Munic. Corp. § 974. A brief reference to some of the cases will further illustrate this proposition. In *Morrison v. City of Lawrence*, 98 Mass. 219, it was held that a city or town could not be held liable in damages for the act of a person unless it appeared that the injury was inflicted by a servant or agent of the city or town while engaged in the legitimate exercise of the service or business for which he was employed. So in *Mitchell v. Rockland*, 52 Me. 118, it was held that neither the relation of master and servant nor of principal and agent exists between a town and its health or police officers; nor was

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the town liable for their unlawful or negligent acts. So in *Brown v. Inhab. of Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709, it was held that one who suffered damage by reason of the neglect or unskillfulness of the selectmen of the town or the physician employed by them in the performance of the the duties imposed on town officers by R. S., c. 14, in relation to the smallpox, had no remedy against the town therefor. And the same principle is announced by many other cases. *Crumbine v. Mayor etc.*, 2 McAr. 578; *Anthony v. Inhab. of Adams*, 1 Met. 284; *Buttrick v. City of Lowell*, 1 Allen, 172; 79 Am. Dec. 721; *Cushing v. Inhab. of Bedford*, 125 Mass. 526; *Pollock v. Louisville*, 13 Bush, 221; 26 Am. Rep. 260; *Everson v. Syracuse*, 100 N. Y. 577; *Hilsdorf v. St. Louis*, 45 Mo. 94; 100 Am. Dec. 352; *City of Richmond v. Long's Adm'r*, 17 Gratt. 375; *Ogg v. City of Lansing*, 35 Iowa, 495; 14 Am. Rep. 499; *Dargan v. Mayor etc. of Mobile*, 34 Ala. 469; 70 Am. Dec. 505; *Alcorn v. Philadelphia*, 44 Pa. St. 348; *Bennett v. New Orleans*, 14 La. Ann. 120; *Stewart v. New Orleans*, 9 id. 461; 61 Am. Dec. 218. These are only a few of the cases that might be cited holding that a municipal corporation is not liable for the torts of its officers under the various conditions stated. Whether they would apply to the real facts in this case, we are not permitted to know, for the reason the plaintiff's complaint does not disclose the facts upon which they seek a recovery. The foregoing citations abundantly show that there is no *general* liability on the part of a municipal corporation for the acts of its officers or servants, and that if such liability exist in any instance it is because of the particular facts of the case. We think the better rule of pleading in such actions is to allege in the complaint the facts upon which the pleader relies for a recovery,—in other words, to plead specifically. In any event enough must be alleged to show that the city was not acting in its governmental capacity as one of the agencies of the State in enforcing the necessary health and police regulations within its limits, and that the wrong complained of was done by an officer of the city while in the legitimate exercise of some duty of a corporate nature

Per Curiam.

which was devolved upon him, by law or by the direction or authority of the corporation. We do not hold that these elements would be sufficient, but they necessarily enter into the question of the city's liability and must in some manner appear before the city is liable. This must be so on principle. Why should the taxpayers of the city of Portland be mulct in damages when they have done no wrong, and it may be had no agency in the transaction complained of further than to carry into effect some positive requirement of the charter by means of their municipal government?

We think the court did not err in sustaining the demurrer, and its judgment is affirmed.

[Filed October 27, 1890.]

In re WM. BECK & SON'S ESTATE.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

PER CURIAM.—This is an appeal from the allowance of the account of J. A. Strowbridge, as administrator of the partnership estate of Wm. Beck & Son. The first objection is that the amount of commissions allowed Strowbridge for his services are too much for the reason, (1) that he agreed to perform such services without pay, and (2) that the amount allowed is too much. We are unable from the evidence presented and the record before us to concur in this objection upon either of the grounds stated, but think he is entitled to allowance made, and that the same is reasonable for the services performed.

The next objection is that the amount allowed for rent was unauthorized, because by an agreement between the deceased and his son the store was to be occupied without rent. The record discloses that the same was done for several years and that the rent charged is rent which has accrued since his death and which the court below held upon the facts terminated the contract. In this we cannot say there was error.

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The next objection is, that the amount allowed A. H. Morgan and G. S. Nicholson for their services in taking the inventory and ascertaining the interests of the parties in the partnership was exorbitant. We think the evidence shows otherwise.

The evidence shows that the partnership business was large and complicated and that the services rendered were of the full value allowed. But as it appears that the service of Nicholson was rendered in ascertaining the conditions of the accounts of the partners, and was for the mutual benefit of the estate of Wm. Beck and the partnership of Wm. Beck & Son, we think the compensation of Nicholson should be paid in equal parts by both estates; and in this respect the decree below is modified, and in all other respects affirmed.

[Filed October 27, 1890.]

In re PETITION OF PETER FENSTERMACHER ET AL.,
APPELLANTS, v. THE STATE OF
OREGON, RESPONDENT.

CIVIL ACTION—DEFINITION.—The phrase "civil actions" includes actions at law or suits in equity and all other judicial controversies in which rights of property are involved, and is used in contradiction to criminal action.

PETITION—DEFINITION.—A petition in common phrase is a request in writing; and in legal language describes an application to a court in writing, in contradiction to a motion which may be made *viva voce*.

FINDING—WHEN DISREGARDED.—When a finding is wholly unsupported by evidence, and that fact is made to appear by a bill of exceptions purporting to contain all the evidence upon this point, this court would disregard it.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

The facts in substance are, that on the seventh day of May, 1887, one John Fenstermacher died in Multnomah county intestate, leaving certain and personal property described herein; that thereafter, on the twentieth day of June, 1887, J. K. Wait was duly appointed administrator of the estate of the said intestate by the county court, and the said estate was duly administered upon and finally settled up by him, and he discharged on the twentieth

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day of May, 1888, as such administrator. No legal heirs entitled to said estate having appeared thereafter, such proceedings were instituted as by law required before the circuit court of Multnomah county as resulted in a judgment declaring all the property belonging to said estate of the said John Fenstermacher, deceased, escheated to the State of Oregon; and in accordance with the judgment or decree rendered therein, the property belonging to said estate was duly sold in accordance with law, and the proceeds thereof, after deducting the necessary expenses, were paid over to the treasurer of the State; that on the twenty-fifth day of May, 1889, the above-named petitioners filed their complaint in the circuit court of Multnomah county claiming to be the heirs at law of the said John Fenstermacher, deceased, and asking for a judgment of said court that they be declared to be the rightful owners to all of said property, etc.; that the cause was tried before the court without the intervention of a jury, and that the court found that the said petitioners were not the heirs of the said John Fenstermacher, deceased, and that neither of them was entitled to any of the property belonging to the estate of the said John Fenstermacher, deceased, which had heretofore escheated to the State of Oregon, and that said State do have and recover its costs, etc., from which this appeal is taken.

W. S. Beebe and John M. Gearin, for petitioners.

Thos. A. Stevens, district attorney, and *W. W. Page*, for the State.

Lord J. (after stating the facts), delivered the opinion of the court.

The first inquiry suggested is, whether the proceeding, authorized by section 3141, is a suit in equity or an action at law. For the State it was argued that the words "in civil actions," used in the section cited, *supra*, indicated that the action was at law, for the reason that if it had been intended to be an equity proceeding the word "suit" would have been used, and not action. But this construc-

tion is not tenable. A civil action is instituted for the purpose of enforcing a private or *civil* right, or to redress a private wrong, as distinguished from actions instituted to punish crimes which are known as "criminal actions." Referring to the act of congress of July 2, 1864, which declares, "That in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions, because he is a party to, or interested in, the issue to be tried," Mr. Justice Miller said: "The phrase 'civil actions' includes actions at law, suits in chancery, proceedings in admiralty and all other judicial controversies in which rights of property are involved, whether between private parties, or such parties and the government. It is used here in contradistinction to prosecutions for crime." *U. S. v. 10,000 Cigars*, 1 Wool, 125; *Green v. U. S.*, 9 Wall, 655; *Rigon v. Crebbs*, 1 Dillon, 184. The phrase, then, "civil actions," as used in the section, *supra*, may mean either a suit in equity or an action at law taken alone, but it is suggested in aid of that argument that the use of the word "petition" and the words "and the court thereupon must try the issue," have a tendency to indicate that the proceeding is in equity. "A petition in common phrase is a request in writing; and in legal language, describes an application to a court in writing, in contradistinction to a motion which may be made *visu voce*." Folger, J., in *Shaft v. Insurance Co.*, 67 N. Y. 547.¹ It is ordinarily used for interlocutory purposes. "As a general rule," said Fleet, V. C., "a petition cannot be presented in a cause until a bill has been filed"; and while he admitted that there are cases in which a proceeding might be instituted by petition, he thought it must be limited to those instances in which the legislature has expressly authorized its use, or where it has the sanction of long-established practice. *Receiver of State Bank v. First Nat. Bank*, 34 N. J. Eq. 451. Under some of the codes it is the first pleading filed, like one complaint by the plaintiff, wherein he states the facts of his case. The word "petition," therefore, lends but little aid to uphold this

contention. Nor do we think the other words, "and there-upon the court must try the issue," any more decisive of the matter. It is true, suits in equity are tried by the court, but so are actions at law, without the intervention of a jury, and by the court when the parties so consent and stipulate as required or provided in section — of Or. Code. But what, to our mind, is more decisive of the matter is the nature of the subject matter to be tried. Its object is to identify the petitioners as the heirs of the intestate and entitle them to recover the money escheated to the State, indicating a legal inquiry for which the proceeding was instituted, and for which courts of law are competent to try. We are of the opinion, therefore, that the proceeding is at law, and must be so regarded in the present case.

Another question raised is, whether this court will interfere if there is no evidence to support a finding. In *Kyle v. Amy*, 19 Or., which was tried without the intervention of a jury, and the finding excepted to, and the evidence included in a bill of exceptions, this court declined to review the evidence on the ground suggested, but remanded the cause for a fuller finding of the facts, but that was more in consequence of a want of particularity in the findings. In *Hicklin v. McClear*, 18 Or. 138, the court said by THAYER, C. J.: "If the findings of the circuit court are wholly unsupported by the evidence, and that fact is made to appear by a bill of exceptions purporting to contain all the evidence upon the point, this court would disregard the findings." So that in *Bartel v. Mathias*, 19 Or. 482, where the question was raised that a certain finding of vital importance in the case was not supported by the evidence, and the evidence upon that point was set out in the bill of exceptions, this court examined it, but finding that there was some evidence having a tendency to support it, held that the finding of a referee is conclusive as to the facts found, if there was any evidence before them having a tendency to establish such facts. In the case in hand, the record discloses after the evidence was all in that the

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counsel for the petitioners asked the court to find "that the petitioners were the heirs of the said John Fenstermacher and entitled to the money described in their petition," which finding the court declined to make, to which refusal an exception was taken and reserved, and thereafter the court found that the petitioners were not the heirs of the said John Fenstermacher, and were not entitled to the money mentioned in their petition, to which finding counsel excepted and the court allowed the same. The evidence is in a bill of exceptions. As this court said in *Hicklin v. McClear*, *supra*, "whether or not that court was justified by the weight of evidence to make the finding, this court cannot consider." The weight of evidence is for that court, and not for us, to determine, however much we might feel disposed to differ from it.

Testing the evidence by these principles, we cannot do otherwise than affirm the judgment.

[Filed October 27, 1890.]

F. G. HICKLIN, RESPONDENT, v. PATRICK McCLEAR,
APPELLANT.

EXCUSABLE NEGLIGENCE—WHAT NOT.—The neglect of a party or his attorneys, under the facts as presented by this record, to inform himself of the recitals in a deed of conveyance by which he claims title and which he offers in evidence, is not such "excusable neglect" as would warrant the court in the exercise of the discretion conferred on it to open a judgment under section 2, Hill's Ann. Code. To justify the interference in any such case, an abuse of discretion must be shown.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

This is an appeal from an order of the circuit court refusing to relieve the defendant and appellant from payment of a judgment recovered of him by the plaintiff and respondent, wherein respondent was adjudged to be the owner of certain real property in controversy in an action of ejectment, brought by respondent against the appellant to recover certain town lots, etc. The cause was heard by the court by consent without a jury, and thereafter made and filed findings of fact and conclusions of law, from

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which a judgment was rendered in favor of plaintiff declaring him to be the owner of said property and entitled to the possession of the same, and from which judgment the defendant then appealed to this court, where said judgment was affirmed. Thereafter, and within one year, the defendant filed a petition in the circuit court asking to be relieved from said judgment, for the reason that the same was obtained through the mistake, inadvertence, surprise and excusable neglect of the petitioner and his attorneys. The petition upon due notice given was heard by the court, considered and denied, and thereupon made and filed the findings of fact and conclusions of law upon which judgment was rendered thereon and from which the defendant appeals to this court.

Henry Wagner and J. R. Stoddard, for Defendant and Appellant.

John H. Hall, for Plaintiff and Respondent.

LORD, J., delivered the opinion of the court.

The mistake or excusable neglect alleged was an omission on the part of counsel for the defendant to ask the lower court to pass upon an exception in a certain one of the deeds offered by them and received in evidence to establish the title of the defendant.

It is claimed by reason of this omission on their part that the defendant was deprived by the judgment in ejectment of his one-fourth interest in the lots, which otherwise would have been excluded from such judgment. The excuse for this omission is that the record of title involved in the action of ejectment was voluminous and complicated, and the exception in the deed referred to overlooked by them, and hence included in the judgment for the whole title rendered in that action. Under the Code, the court may, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment or order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Hill's Code,

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§ 102. The court below found: "That on the said trial the attorneys for the defendant did not claim or pretend that the plaintiff did not take by his deeds aforesaid (if he took any interest whatever) the whole estate and every part thereof in said lots, and did not claim nor pretend to claim that the chain of title which plaintiff Hicklin relied upon failed to convey the one-fourth interest referred to in the petition, if any interest was conveyed thereby." And further: "That the attorneys for Hicklin, in a written brief, briefly discussed the effect and operation of the exception in the above-mentioned deed, etc., but inasmuch as the attorneys for the defendant did not specifically claim that the plaintiff could not take under the deeds which he introduced more than a three-fourth interest, the court did not consider the point suggested by the brief of the plaintiff Hicklin's attorney and did not pretend to construe the said exception in the deed of April 13, 1860, and assumed that the recital of lots and blocks sold by Love & Tibbets prior to April 16, 1858, was true, and that block three was one of those so sold." And as a conclusion of law found that the matter and things alleged and found did not constitute such surprise, inadvertence or excusable neglect on the part of the defendant McClear and his attorneys as would authorize the court to grant the prayer of the petitioner, and dismissed the petition. It will be noted that the deeds of the record were open to the inspection and in the possession of the defendant and his attorneys, and that the matter involved in the action was of that character which required that they should examine, ascertain and know the rights of the defendant in the premises under the deeds and in the action. More, that the attorneys for the plaintiff, in a written brief, discussed the operation and effect of the exception in the deed referred to, presumably claiming then, as now, that such exception did not exclude the right of the plaintiff to the whole title, including the one-fourth interest, thus specifically attracting the attention of the attorneys for the defendant to the exception and the construction and effect

claimed by them to be given to it; yet despite all this, no attention was paid to the exception by the attorneys for the petitioner, nor any claim whatever made, that the plaintiff did not take the interest now involved and sought to be excepted from the operation of the judgment. It would seem then that the attorneys for the defendant not only neglected or omitted to examine and acquaint themselves with the contents of the deed offered in evidence by them, and in support of their title, but also, when their attention was invited to a brief discussion of the exception, they either disregarded it, or considered it of too little importance to require an answer, or to require the court to pass upon it. Under these circumstances, it is difficult to plant this case upon any tenable ground within the purview of the section of the Code cited. While these statutes are to be regarded as "remedial in their character and intended to furnish a simple, speedy and efficient means of relief in a worthy class of cases," they are not intended "to allow a party once having an ample opportunity to present his defense, or cause of action, to represent it at some future time with such other features as a more mature reflection should happen to suggest." *Freeman on Judgments*, §§ 106, 111.

It is true that some few cases may be found which seem to ininge the principle of the absolute verity of judgments and open them for purposes of doubtful legal propriety. In *Levy v. Joyse*, 1 Bos. 624, a judgment was opened so as to permit a defendant to make certain proof which by mistake he had neglected to offer, a conclusion that the court could not forbear saying, had not been reached "without some hesitation." But the case at bar goes further, and invokes a relaxation of the principle which demands the exercise of reasonable diligence and vigilance in the conduct of an action or defense.

It asks us to say that the neglect of a defendant or his attorneys under the circumstances indicated, to inform himself of the recitals in a deed by which he asserts or claims title, and which he offers in evidence, is such

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neglect as is "excusable" within the purview of the statute, and that the refusal of the court thus to consider it was a gross abuse of the discretion confided to it. To avoid further comment, it is enough to say that we have been unable to find a case, nor have we been referred to any, which would warrant the lower court in the exercise of the discretion conferred upon it to vacate a judgment upon the facts as found and presented by this record, much less to justify us in interfering with its discretion when exercised, except a strong case of abuse is shown.

The judgment must be affirmed.

[Filed October 26, 1890.]

L. F. CHEMIN, APPELLANT, v. CITY OF EAST PORTLAND, RESPONDENT.

APPEAL—JUSTIFICATION OF SURETIES—POWER OF COURT TO SHORTEN TIME.—The court below had no power to shorten the time allowed by law for the justification of sureties on appeal, and when the transcript was filed in this court, before the time fixed by law for such justification, the same must be stricken from the docket.

APPEAL from Multnomah county: L. B. STEARNS, judge.

The final decree in this case was rendered on the thirtieth day of September, 1890. On the same day the appellant served his notice of appeal, and filed his undertaking on appeal. On the sixth day of October, 1890, the respondent excepted to the sufficiency of the sureties and served notice thereof upon appellant's counsel, who thereupon gave notice that the sureties would appear at once to justify.

On the same day the appellant and respondent appeared in open court, and after hearing the appellant's application, the court made an order shortening the time for the justification of the sureties from ten days to two hours. At the time fixed by the court for such justification, being October 6, 1890, at the hour of 3:30 P. M. of said day, the appellant produced his sureties in open court, and respondent's counsel, though present, declined to examine as to

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their qualifications and thereupon the court adjudged them sufficient. On October 7, 1890, the transcript was filed in this court.

STRAHAN, C. J., delivered the opinion of the court.

The respondent has filed a motion to dismiss the appeal and also to strike the case from the docket. The only question material to be considered is whether or not the case should be stricken from the docket, and that depends on the effect of the order of the court below shortening the time within which the sureties were required to justify. Section 524, Hill's Code, authorizes the court, when notice of a motion is necessary, to prescribe a shorter time than ten days, by an order endorsed on the notice; but the Code does not empower the court to shorten the time fixed by law for the justification of the sureties on appeal. In this case the appeal was not perfected when the transcript was filed in this court, and the motion to strike the case from the docket must be allowed. *Callahan v. Portland, etc., R. Co.*, 17 Or. 556.

The appellant may have leave to withdraw his transcript.

[Filed November 3, 1890.]

JOSEPH GSCHWANDER, RESPONDENT, v. JOHN CORT,
APPELLANT.

19	513
27	543
19	513
87	71
19	513
48	200

PLEADING—DEMURRER—ANSWERING OVER—VERDICT.—Where a defendant demurs to the complaint, which being overruled, answers over, and a verdict and judgment are rendered against him, the judgment will not be reversed on objection to the complaint on appeal, though some of its material allegations appeared to be legal conclusions, and the breaches in the writing declared upon were defectively assigned.

The plaintiff declares upon a contract as follows.

"CONTRACT.

"This agreement, made and entered into this twenty-sixth day of November, A. D. 1889, by and between John Cort, proprietor Standard theatre, Seattle, Washington, party of the first part, and Gschwander Trio, parties of

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the second part—witnesseth: That the party of the first part engages the parties of the second part for twelve weeks, commencing on December 9, 1889, and continuing to March 2, 1890, to enact their singing (Tyrolean warbling) and zither specialties at John Cort's circuit of theatres, at a weekly salary of ninety dollars (\$90). In case that the performance of the undersigned should prove incompetent, or unsatisfactory to the party of the first part, said party of the first part shall have the right to *terminate this contract at any time and shall not be held liable for any damages for such termination* or for any wages after such termination. The said parties of the second part agree not to perform at any other place of amusement in said city previous to or during the time above stated, unless by permission of said party of the first part. It is understood and agreed to by both parties that the number of performances to be given each week shall be according to the custom of said place of amusement and city at which they may be required to appear, and on all holidays. And it is distinctly understood that performers' services belong to the management from the beginning to the close of each performance during their engagement. The parties of the second part engage and bind themselves unto the party of the first part for the time, terms and conditions above stated, and agree to aid and assist to the best of their ability in the capacity of vocalists—Tyrolean warblers; the engagement holding good until it has been faithfully fulfilled by the parties of the second part, or cancelled by the party of the first part for intoxication, vulgarity or infringement of the rules by the parties of the second part. It is further agreed that the sum of four and fifty one-hundredths dollars (\$4.50-100) commission shall be deducted from the salaries of the said parties of the second part every week pending this agreement and the same forwarded at the expiration of each week to the Cricket Amusement Agency at San Francisco, California. If the parties of the second part are reengaged, or the engagement is extended,

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the commission to continue. Witness our hands and seals the day and year first above written.

(Signed) "JOHN CORT, per ——. [SEAL.]

"DOUTRICK & McVEY, agents. [SEAL.]

"PROF. JOS. GSCHWANDER. [SEAL.]

"SPECIALTY ARTISTS, TAKE NOTICE.—Send in your business two weeks in advance to managers. Do not depend on us to do it."

The defendant demurred to the complaint for the reason that the same did not contain facts sufficient to constitute a cause of action, which being overruled he filed his answer. The defendant, after denying some of the allegations of the complaint, alleged as new matter that Spokane Falls was within the circuit of Cort's theatre, and that the Tyrolean Warblers refused to go there to perform when requested by Cort. The reply admitted that Spokane was within the circuit, but denied that Cort requested the Warblers to perform there. Upon these issues a trial was had and a verdict and judgment given for the plaintiff, from which this appeal was taken. There is no bill of exceptions, and the sole question presented is whether the complaint states a cause of action.

Alfred F. Sears, Jr., for Appellant.

Alex. Bernstein, for Respondent.

STRAHAN, C. J., delivered the opinion of the court.

The meaning of two clauses of the contract have been presented, one by defendant and the other by plaintiff. The defendant relies upon this clause of the contract: "In case that the performance of the undersigned should prove incompetent or *unsatisfactory to the party of the first part*, said party of the first part shall have the right to terminate this contract at any time, and shall not be held liable for any damages for such termination or for any wages after such termination." The defendant claims that he had a right under this part of the contract to terminate it when he saw proper to do so, and of that he was made

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the sole judge by the terms of the contract itself. The plaintiff contends that the foregoing clause is modified by this provision: "The engagement holding good until it has been faithfully fulfilled by the parties of the second part, or canceled by the party of the first part for intoxication, vulgarity or infringement of the rules by the parties of the second part." The rule of construction is, that each and every part of a contract must be so construed that all may have effect, if it can be done. Looking at this entire contract, and its manifest object, the first clause may properly be held to refer to the competency of the plaintiff's Tyrolean Warblers and their ability to give satisfaction to the defendant; and the other clause relates entirely to the personal conduct of the Warblers in and about the defendant's theatre. The two clauses relate to different subjects and were inserted for different purposes. The last clause does not in any way limit or affect the first. If the defendant had alleged in his answer that the performance of the Tyrolean Warblers proved incompetent or unsatisfactory to him, and that he terminated the contract for that reason, an altogether different question would have been presented. It would have then become necessary to determine whether or not the contract sued on is within the principle announced in *Zaliski v. Clark*, 44 Conn. 218; 26 Am. Rep. 446; *Brown v. Foster*, 113 Mass. 136; 18 Am. Rep. 463; *McCarren v. McNulty*, 7 Gray, 139; *Bucksport etc. R. Co. v. Inhab. of Brewer*, 67 Me. 295; *Plano Mfg. Co. v. Ellis*, 68 Mich. 101; *Gibson v. Cranage*, 39 *id.* 40; *Hoffman v. Gallagher*, 6 Daly, 42; *Gray v. Central R. R. Co.*, 11 Hun, 70; *Wood R. & M. M. Co. v. Smith*, 50 Mich. 565; 45 Am. Rep. 57; Benjamin on Sales (Bennett Ed.), pp. 560, 561, note; *Singerly v. Thayer*, 108 Pa. St. 291; 54 Am. Rep. 715, and note. But the defendant did not make this question in his answer. He tendered a different issue altogether, and having been defeated on it before the jury, seeks to try a different question in this court. It is true the complaint is somewhat faulty in the manner of assigning breaches of the contract sued on. It is alleged that the defendant wrongfully and without cause discharged

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plaintiff and his "Gschwander Trio" and refused to permit them to serve as aforesaid, though they were ready and willing to serve. It would have been better pleading to have followed the wording of the writing in assigning breaches, but we are not trying this case now on demurrer, but are considering the sufficiency of the complaint after verdict. In such case a more liberal intendment prevails in support of the judgment and which we think ought to be invoked in this case. *Aiken v. Coolidge*, 12 Or. 244; *Houghton v. Beck*, 9 Or. 325; *Andros v. Childers*, 14 Or. 447; *Willer v. O. R. & N. Co.*, 15 Or. 153.

It follows that the judgment appealed from must be affirmed.

[Filed November 10, 1890.]

JAMES STEEL, ADMINISTRATOR, RESPONDENT, v. JOSEPH HOLLADAY, PETITIONER AND APPELLANT.

RECEIVER—SALARY.—When the parties to a litigation by their attorneys ask the appointment of a person as receiver who is an interested party and represent to the court that his appointment would save the salary to the estate of the receiver then in office, and the court makes such appointment, and he serves as such receiver until removed without making any claim for compensation, upon an application to the court after such removal to be allowed a salary during the time he so served, and the court below refused to make such allowance; *held*, that no error was committed.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

Williams & Wood and *Mitchell & Tanner*, for Respondents.

R. & E. B. Williams and *C. H. Carey*, for Appellant.

LORD, J., delivered the opinion of the court.

This is an application of Joseph Holladay for compensation as receiver for services performed as such, in the care, custody and management of certain property, during the period named therein. The petitioner was appointed jointly with Geo. Weidler as such receiver, and alleges that a reasonable compensation for his services would be the sum of \$250 a month, which aggregates for the period during which he performed such services in all the sum

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of \$9,500, etc. After issue was joined, the evidence taken, and the court fully advised in the premises, it found the following facts: "First, that at the time of the appointment of said Geo. W. Weidler and Joseph Holladay receivers herein by the order and decree of this court, it was the understanding and agreement, and it was so represented to the court at the time of their appointment, that in case they should be appointed such receivers in place of D. P. Thompson they should not receive or claim any compensation for their services as such receivers, they both being interested in the property of which they were appointed receivers—the said Joseph Holladay as mortgagee in possession thereof, and the said Geo. W. Weidler as the owner of three-eighths of the capital stock of the Willamette Steam Mills Lumbering and Manufacturing Company; and that said Joseph Holladay continued to be, while he was such receiver, a mortgagee in possession of said property of which he was appointed receiver, and having and holding a lien thereon to the extent of \$346,686.46, and was largely interested in said property as such mortgagee and was also the principal party defendant to the said suit to which he was appointed such receiver, and would not have been appointed a receiver therein without the consent of Ben. Holladay; and that he consented thereto with the understanding that said Joseph Holladay, if appointed such receiver, would not claim or be entitled to any compensation as such receiver; and that in order to be appointed one of said receivers he consented to act without compensation, and continued so to act during the whole time he was such receiver, without ever having filed or made any claim herein for compensation as such receiver," etc.

The evidence upon this finding tends to show that there never was any agreement that the petitioner Holladay should not receive any compensation for his services as such receiver, but it does tend to show that there was a general understanding among the attorneys who represented the parties to the suit, and that it was so represented

to the court, that the appointment of the petitioner and Mr. Weidler would result in saving to the estate the salary of the receiver then in office. The petitioner was a heavy lien holder against the estate and his appointment would hardly have been asked or allowed by the court unless the consent of the adverse party was understood at least to have been obtained. Judge Bellinger, who was of counsel for the adverse party, after admitting some conversations, in which it was talked over by the attorneys in respect to an understanding or agreement among themselves that the appointment of the petitioner and Weidler would save the estate the expense that was incurred in keeping D. P. Thompson in office, was asked:

Question—"I think you and Mr. Strong and others were present at these conversations and all parties were represented. We were present in court here when the matter was presented to the court."

Answer—"Yes."

Q.—"Wasn't it stated to the court when this matter was submitted * * * that it would result in a saving to the estate?"

Ans.—"I think I so stated to the court myself; I think I urged it upon the court."

Q.—"Saving the salary of the receiver?"

Ans.—"Yes."

It seems to me that these facts indicate that the matter of saving the expenses of a receiver had been talked over by the attorneys of the respective parties; that they were present in court when the appointment was asked, and when Judge Bellinger stated and urged upon the court, as a reason for the appointment, that it would result in a saving of the salary of the receiver, and that such representation so made became one of the material facts upon which the order for the appointment was predicated. It is true that in this connection Judge Bellinger immediately adds that it was then thought by them that the estate would soon be settled up; that he had no idea it would continue in the way it has, and involve the labor it has

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imposed upon the receivers, and expresses the opinion that his statements in this regard ought not to preclude the petitioner or especially Mr. Weidler from his right of compensation; "for the fact is," he says, "at that time I supposed the thing would be over in a very little while; we were already negotiating, thinking we could raise the money, and sell this whole property out to a syndicate in the course of a few months, and straighten it all up." This is undoubtedly true, for all the evidence, so far as I have examined it, tends to corroborate it. The reason, then, at the time the appointment of the petitioner was asked, that the matter of saving the salary was urged in favor of that appointment was based on the supposition, honestly entertained and which circumstances seem to justify, that an arrangement could be made by which a speedy settlement of the estate could be effected, and the whole matter cleaned up in a few months. This expectation was doomed to disappointment: instead of requiring only a few months to settle the estate, over three years elapsed in which the petitioner performed duties in regard to its custody and management, prior to his removal, and the estate was not then settled. It perhaps might be inferred from an agreement in which all the parties had joined, which had been made two days previous to the appointment of the petitioner and Weidler, and in which it was stipulated that the court might remove the receiver then in office and appoint the petitioner and Geo. Weidler receivers to take charge of, manage and dispose of the property mentioned in the memorandum specified during the term of three years, provided in that agreement that a longer period than a few months was understood and anticipated for the settlement of that estate. But, I take it, the time specified in the agreement was not considered, nor inserted with reference to the time it was expected that such receivers, if appointed, should serve, so much as to make sure, no matter what unforeseen complications might arise, enough time should be provided to other purposes for which that agreement was executed. In this

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view it is consistent with the expectation entertained that the estate might and would be speedily settled. Considering, then, that such was the expectation that only a short period of service was anticipated, when it was suggested to the court that the appointment of the petitioner and his co-receiver would save the expense of the salary of the receiver then in office, it does not appear that the court was of that expectation or calculation, or however that may be, ought such consideration to influence us to obviate the effect of such representation, if it induced the court to act and make the appointment and grant the allowance prayed for by the petitioner, when he continued to serve during all that time without complaint or compensation?

The circumstances already indicated present the parties pro and con by their attorneys before the court, all favoring the appointment asked for, and during the consideration of which it is represented and urged upon the court that the making of such appointment would result in saving the salary of the receiver to the estate; and the court acting upon such representation, makes the order for the appointment, is not such a representation a foundation stone upon which that order of appointment was made, as much so as if the court had so stated in its order, and ought not the petitioner to be bound by it in the absence of any complaint or application for its modification and allowance of reasonable commissions or salary? Was not the court and those interested in the preservation of the estate justified in assuming, at least under such circumstances, that compensation was not expected, and that the services were continued on the terms which induced and secured his appointment? When it is considered that the appointment lies with the court below, who is supposed to be familiar with the transaction or litigation requiring it, and the reasons for it, the ineligibility of the petitioner without the consent of the adverse party, the representation of saving expenses to the estate to secure it, the many reasons, family and otherwise, which will readily occur for

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his serving without compensation, the admission to others that he was so serving, the corroborating circumstances that he did continue to serve from the appointment to his removal without any claim for compensation, and the seeming want of any other object to be served by the removal of the receiver then in office, without some such reason it seems to us no sufficient cause is shown for our interference, or to authorize us to remand the proceeding for the ascertainment of the value of such services. It results that, in our judgment, the decree must be affirmed.

[Filed November 10, 1890.]

**THOMAS HARTVIG, RESPONDENT, v. N. P. L. CO.,
APPELLANT.**

WRONGDOER—WHEN LIABLE.—It is well settled that a wrongdoer is liable for an injury which resulted as the natural and probable consequences of his wrongful act, and which he ought to have foreseen in the light of surrounding circumstances.

JURY—PROXIMATE CAUSE.—It is ordinarily the province of the jury to ascertain whether the injury is the natural and proximate cause of the wrong complained of.

DUTY OF MASTER TO OBSERVE CARE.—It is the duty of the master to observe due care and not to expose his servants to unreasonable risks; and when the nature of the business requires it, to make needful rules or regulations for its safe conduct so as to protect those in his employment against accidents.

FACTS—WHEN FOR THE JURY.—It is not for the court to speculate upon the facts, but to submit them to the jury, if they tend to support the cause of action.

APPEAL from Multnomah county: E. D. SHATTUCK, judge

Thos. N. Strong, for Defendant.

B. Citron, for Plaintiff.

LORD, J., delivered the opinion of the court.

This is an action to recover damages for injuries alleged to have been sustained by the plaintiff on account of the negligence of the defendant, its agents and servants. The only error complained of is the refusal of the court to grant a motion for non-suit interposed by the defendant. In substance the facts are these: The plaintiff was an ordinary laborer on the night force at the defendant's saw mill, who was engaged with other laborers at the foot of

19 522
21 143
25* 358
27* 98

19 522
25 294
25* 358
35* 654

19 522
26 178
25* 358
37* 478
19 522
34 551
34 265

the lumber chute for the purpose of removing lumber as it descended to the foot of the chute and distributing it about the yard. On the evening alleged, while the plaintiff was at his work, it being nearly dark and the lighting of the lamps in the mill had begun, a large stick of timber was passed out from the saws over the rollers to the head of the chute by the men above, and when it passed the last rollers, coming end first, one-half of the stick would project straight out, and when the center was passed without giving any warning, it was let go and descended down the chute with great force, striking in its descent a small timber in the pile which flew around and violently struck the plaintiff and injured him. In the performance of this work at the foot of the chute, the evidence shows that the pushing of timber over the rollers at the head of the chute, especially when a heavy timber like the one in question was to be sent down it, rendered the place at which the men worked at the foot of the chute extremely dangerous and an unsafe place to work, unless some notice or outcry was given so that they might take precautions for their safety. It does not appear that the defendant in the conduct of this work established any rule or regulation requiring such warning to be given, or that the men at the top of the chute gave it, except of their own choice, which was irregular, and often caused the interchange of much swearing between the men at the top of the chute and those at work at its foot. The plaintiff is a Russian Finn and speaks very little English, had done little or no work of that kind, was not acquainted with nor informed of the dangers of the work. When the injury occurred the plaintiff was a few feet away from the foot of the chute engaged in the duties required by his employment. Upon this state of facts the contention is, (1) that the failure to give the warning when the timber was started in its descent down the chute was not the proximate cause of the injury; (2) that if the failure to give the warning was negligence which caused the injury, it was the negligence of a fellow servant, for which the defendant

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company was not liable; (3) that if the warning had been given a like injury would have occurred to the plaintiff. Taking these propositions, as stated in their order, the first contention is that the injury was not occasioned by the descent of the timber for which no warning was given, but by another piece in the pile of lumber at the foot of the chute which it struck with great force and misplaced and sent forcibly and violently against the plaintiff, causing and inflicting upon him the injury of which he complains. The evidence shows that it was not unusual for timber and lumber to accumulate at the foot of the chute and on the chute; that the chute is hardly ever free from it; that sometimes it is so full or choked with lumber that such lumber acts as a buffer and retards the downward progress of the descending timber,—all of which tends to show that if there are only some pieces of timber on the chute or piled at the bottom of it, when a large piece is started down the decline and the chute is not so choked up as to retard its headway, that, from the nature of the incline, it must descend with great force and necessarily is liable to strike other sticks of timber, as here, of much less size, to which it will communicate its force and propelling power, sending it forcibly in the direction the power is received. But in this there is no break in the causal connection between the wrong complained of and the injury occasioned by it; no intervening agency changing or affecting the operation of the prime cause of the injury. As the heavy stick of timber was sent down the chute without any warning to the men at work at its foot, the wrong in thus sending it is naturally and directly communicated to the other piece of timber, which was there at the time under the circumstances indicated, and not through the intervention of some independent agency, making no break in the succession of events from the primary cause to its result in the injury.

One event followed the other in a continuous sequence without any immediate cause operating between the wrong and injury. The small piece of timber struck was there

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as an incident to the work in hand, and it derived its force and propulsion and became linked with the prime cause by a causal connection which made the injury it occasioned the natural and probable consequences of the wrongful act or omission. *Railway Co. v. Kellogg*, 94 U. S. 475; *Jacker v. Railroad Co.*, 52 Wis. 152; *Nelson v. Railroad Co.*, 30 Minn. 77; *Railroad Co. v. Hope*, 80 Penn. St. 377.¹ This being true, the wrongful act or omission was the proximate cause of the injury. The principle is well settled that a wrong-doer is liable for the injury which resulted as the natural and probable consequence of his wrongful act of which he ought to have foreseen in the light of surrounding circumstances. And as the court said in *Ranstier v. Railroad Co.*, 32 Minn. 334: "Whether the injury in a particular case was such natural and proximate result of the wrong complained of is ordinarily for the decision of the jury." *Reiper v. Nichols*, 31 Hun. 495. It is their province to look at the facts as they transpire and ascertain whether they are naturally and probably connected in orderly sequence with the prime cause, or disconnected by some intervening agency affecting its operation. Upon this state of the evidence we are not authorized to take the case from the jury and say the wrongful act or omission was not the proximate cause of the injury. The next contention is based on the assumption, that as the men at the top of the chute and those at the foot were engaged in a common undertaking they were fellow servants; and as the failure to give the warning was the negligence of some one of those above, it was the negligence of a fellow servant, for which the defendant company was not responsible, and therefore no recovery can be sustained upon that state of facts. The evidence establishes that it was the duty of the defendant company to provide such rule or regulation for the conduct of the work as would make the place at which the plaintiff worked reasonably safe; that to accomplish this object and render those at the foot of the chute where the plaintiff worked reasonably safe, it was necessary that a warning outcry should be given, so

(1) 21 Am. Rep. 100.

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that when timber was started down the chute, and especially heavy timber and at night time, the men at the foot of the chute might have notice of its coming and get out of danger, or take precautions for their safety. The evidence shows that the plaintiff provided no such rule or regulation for the conduct of this dangerous work, but left the men engaged at the top of the chute without any direction in the matter,—those at the top and bottom of the chute shouting backward and forward at each other; and, as the counsel for the defendant says, the men at the foot of the chute abusing and swearing at those at the top whenever, in their opinion, they failed to give the proper warnings.

This exhibits a condition of things which nothing could more plainly show the necessity of the defendant providing a rule or regulation in the conduct of the work, prescribing and requiring those at the head of the chute not to start timber, and especially heavy timber and at night time, when the danger is increased, without giving a warning outcry in order that those at the foot of the chute engaged in the performance of their labor might have notice of the descent and take precautions for their safety. The place at which they and the plaintiff worked could only be rendered reasonably safe by the establishment of some such rule or regulation. As it is the duty of the master to furnish a reasonably safe place for his servant to work, it became the duty of the defendant company to provide such reasonable rule or regulation in the conduct of its business as would protect the men while engaged in their work at the foot of the chute. It required the defendant not simply to employ skillful and competent agents and employes on its service, but to adopt rules and regulations adapted to the dangerous nature of the business so as to guard against accidents,—in a word, to be vigilant in the use of means and in the adoption of measures to make the servants reasonably safe in their employment. To this extent the master assumes the risks, while the servant assumes the natural and ordinary risks incident to

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the business in which he is engaged, including those arising from the negligence of his fellow-servants. As was said in *Anderson v. Bennett*, 16 Or. 529,¹ the duty devolving on the master is affirmative to take such measures, or to adopt such precautionary measures as the proper and safe conduct of his business requires to avoid accidents. An application of this principle to the defendant requires it to establish some suitable rule or regulation for the prosecution of this business which would render its employes reasonably safe in the discharge of their duties in the course of their employment. It was bound to observance of such care as would not expose them to risks and perils which might be guarded against by proper diligence or by the promulgation of suitable or needful rules for the safe management of its business.

If the defendant had provided some such rule requiring the men at the head of the chute to give warning before timber was started down the chute, and they should neglect to do it and an injury should occur to those below, the defendant, having performed its duty, would not be liable, no more than when a master furnishes a safe instrument and competent servant, and in using it such servant negligently injures a co-servant. Upon the facts as disclosed by this record the defendant has not exercised that care which the exigency of the situation required for the safety of those employed at the foot of the chute and is not in a condition to avail himself of the rule of non-responsibility to a servant for an injury caused by a fellow-servant. "Though we have said," justly remarked Baron Alderson, "that a master is not generally responsible to a servant for an injury occasioned by a fellow-servant while they are acting in a common service, yet this must be taken with *the qualification* that the master shall have taken due care not to expose his servants to unreasonable risks. It results that upon this phase of the case there was no error in refusing to take the case from the jury. The last point of contention is, that if the warning had been given when the timber was started

(1) 8 Am. St. Rep. 311.

Points decided.

down the incline, a like injury would have happened to the plaintiff. This is based on the assumption that the facts show that the position he occupied relative to the foot of the chute when the injury occurred was reasonably safe, and that if the warning had been given he would have remained where he was and not likely have changed it.

The evidence shows that he was at work near the foot of the chute, the nature of which necessarily required him to stoop often, his head in front of him and his body inclined over, so that at such time it was not possible for him to see the timber, although it may be seen by looking while it is being trimmed. How he would have acted if the warning had been given under such circumstances it is not possible for us to know. The piece of timber was unusually large and came down with a terrible crash and impetus, and we are bound to assume in view of the facts that he would have taken such precautions as the instincts of self preservation would have suggested on the occasion. It is not for us to speculate upon this, especially when the fact that he was injured at the place where he was, near the foot of the chute, while engaged in the performance of the duties. These facts tend to show that the place at which he worked was dangerous or unsafe, unless warning was given, and to emphasize its necessity to afford him an opportunity at least to take precautions for his safety. In cases of this character it is the peculiar province of the jury to determine the facts; and the court below committed no error in refusing the motion for non-suit, and allowing them to exercise their functions.

The judgment must be affirmed.

[Filed November 10, 1890.]

STATE OF OREGON, RESPONDENT, v. TAMLER & POLLY, APPELLANTS.

SELLING LIQUOR—FORM OF INDICTMENT.—In an indictment for selling spirituous liquor without a license, under the act of 1889 it is not necessary to allege in the indictment that such sale did not take place within an incorporated town or city.

19	528
24	67
25*	71
32*	1033
19	528
182	52
32	264

19	528
35	382

19	528
686	22

19	528
780	486

19	528
41	368

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CRIMINAL LAW—MOTION TO ACQUIT—PRACTICE.—A motion asking the court to direct an acquittal in a criminal case on account of the failure of proof on the part of the State, unless such failure is a total one, must specify wherein it is claimed such proof fails.

APPEAL from Multnomah county: L. B. STEARNS, judge.

The defendants were jointly indicted, tried and convicted of the crime of selling spirituous liquors without first having obtained a license therefor, as provided in the act of 1889. The charging part of the indictment is as follows: M. Tamler and Jos. Polly are accused by the grand jury of the county of Multnomah, State of Oregon, by this indictment, of the crime of selling spirituous liquors in this State in less quantities than one gallon, without having first obtained a license from the county court of the county of Multnomah for that purpose, committed as follows: That said M. Tamler and Jos. Polly on the fifth day of July, A. D. 1889, in the county of Multnomah and State of Oregon, did unlawfully and wilfully sell spirituous liquors in this State, namely, whisky, in less quantities than one gallon, to wit: about one gill of whisky to one Timothy Maloy for ten cents; the said M. Tamler and Jos. Polly not having first then and there obtained a license from the county court of Multnomah county for that purpose, namely, for the purpose of selling that quantity of liquor, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon. Dated at Portland in the county aforesaid, this fifteenth day of July, 1889.

Sears & Beach and E. Mendenhall, for Appellants.

T. A. Stevens, district attorney, for Respondents.

BEAN, J., delivered the opinion of the court.

The bill of exceptions in this case contains several assignments of error, but, upon the argument, they were all abandoned by counsel, except that the indictment does not state facts sufficient to constitute a crime, and the refusal of the court to sustain defendant's motion for a judgment in favor of the defendants on the ground of the

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insufficiency of the evidence to justify a verdict, made at the close of the testimony of the State. The appellants contend that the indictment is insufficient, in that it does not allege that the sale therein charged was not made within an incorporated town or city. The contention is that as section 11 of the act of 1889 provides that, "nothing in this act shall be so construed as to apply in any manner to incorporated towns and cities of this State," it is necessary that the indictment should negative this section. The general rule on this subject is, that where the exception or proviso is stated in the enacting clause, it is necessary to negative them in order that the description of the offense may in all respects correspond with the statute; but where such exception or proviso is contained in another or subsequent section of the statute, it is a matter of defense and need not be negated in the indictment. 1 Bishop on Crim. Pro., §§ 631, 633; *Mills v. Kennedy*, 1 Bailey S. C. 17. While this seems to be the general rule, there is much diversity of judicial utterances as to the proper application, and to attempt to reconcile the authorities would be a useless if not hopeless task. When the exceptions or provisos are a material part of the description of the offense, it is necessary to negative them in the indictment. The indictment must contain such averments as show affirmatively an offense; and where the exceptions or provisos are a material part of the description of the offense, the indictment must aver that the act charged does not come within the exception or proviso. The exceptions should be negated only when they are descriptive of the offense, or a necessary ingredient of its definition; but when they afford matter of excuse merely, they are matters of defense and therefore need not be negated in the indictment. The offense defined in the act of 1889 is that of selling spirituous, vinous or malt liquors in certain prescribed quantities, without first having obtained a license in the manner prescribed by law. The provision of section 11 is no part whatever of the description of the offense nor a necessary

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ingredient of its definition, but is simply a limitation in the application of the provisions of the act. The description of the offense of selling liquor without a license is full and complete without reference to the provisions of this section, and since it forms no part of the definition thereof it is mere matter of excuse or defense and need not be negatived in the indictment.

As to the remaining point urged by counsel for appellants, we are of the opinion that the record before us does not properly present the same for our consideration. The record discloses the fact that after the State had rested, "counsel for defendants moved the court for a judgment in favor of the defendants on the ground of the insufficiency of the evidence to justify the verdict." This motion being overruled, an exception was duly taken and this ruling is now assigned as error. This motion was no doubt intended to follow the practice provided in civil cases where the plaintiff fails to prove a case sufficient to be submitted to a jury, but we have already held in *State v. Jones*, 18 Or. 256, that such practice is not applicable to criminal cases; but the proper practice is to ask the court to direct an acquittal. But treating this as a motion to direct an acquittal of the defendants, we still think it is insufficient to raise the question argued by counsel in this court. As this is an appellate tribunal, constituted to revise and correct the errors committed by the trial court, it is only when that court has acted, and the act is claimed to be error and disclosed by the record that such error becomes the subject of our power and duties. The motion in this case is a general one and only challenges the general sufficiency of the evidence, that is, says, in effect, there is a total failure of evidence. Upon a motion of this kind, the only question raised is whether there is any evidence tending to prove the crime charged, not whether the evidence fails in some particular matters.

In a motion asking the court to direct an acquittal, where it is claimed that the evidence is insufficient to prove the crime charged, it ought to specify the particulars in which

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it is claimed the evidence is insufficient, unless there is a total failure of proof, otherwise the attention of the trial court will be directed to the evidence as a whole, that is, whether there is any evidence upon which a verdict may be founded, and wholly omit to consider the particular matter in which the alleged insufficiency consists, and which is relied upon in this court and perhaps subsequent research may have suggested. It is true, unless there is some evidence upon which a jury can found a verdict for the party producing it, such verdict ought not to stand, nor will it under a motion of this kind, when the evidence considered as a whole reveals a total failure of proof, or want of any evidence upon which to found a verdict. But where there is some evidence tending in a general way to prove the offense charged, but its alleged insufficiency lies in some particular matter or specific objection which requires to be designated or specified to make apparent in what particular that insufficiency consists and to attract the attention of the court to it, it ought, as a general rule at least, to be specified in the motion of non-suit to be entitled to consideration in this court. The evidence in this case tends to show that three and one-half miles from Portland on the McAdam road there is a place known as the Blue House; that it is fitted up as a saloon with bar and other fixtures, with glasses and bottles on the shelves; that it is known as a saloon; that defendant Polly usually had charge of the place in the forenoon and sometimes defendant Tamler in the afternoon, and the general reputation was that the defendants Tamler & Polly were the proprietors thereof; that about the fifth day of July, 1889, defendant Polly sold to one Maloy a drink of liquor which the witness supposed to be whisky, and that Maloy paid for the same; that neither Polly nor Tamler had a license to sell spirituous liquors. A witness by the name of Timothy Maloy was called and testified in the case, and said he had purchased liquor at different times and about July 5, 1889, in the saloon claimed to belong to defendants and had paid for the same. A cursory examin-

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ation of this testimony would naturally lead a court to think there was sufficient evidence to be submitted to a jury, and while there may be a failure in some particular, unless the particular instance in which the failure occurs is pointed out, it would probably escape attention.

The contention of counsel on this appeal is that the evidence is insufficient in this: (1) there is no sufficient evidence of the value of the liquor alleged to have been sold by defendants; (2) no sufficient evidence that the sale was made to Timothy Malloy named in the indictment, and (3) there is no sufficient evidence that the liquor sold was spirituous liquor as alleged in the indictment. These objections are technical in their character and do not go to the general sufficiency of the evidence. If counsel for defendants relied upon the grounds urged here for asking the court below to direct an acquittal of his clients, he should have so stated and thereby given the court an opportunity to have passed upon them; and if the ruling was against him, preserve the same on the record so we could be advised thereof. It is very possible that the grounds upon which the appellant now contends the motion should have been granted, might have been obviated at the trial had they been stated. We are not advised from the record what reason, if any, was assigned in the court below why this motion should have been allowed nor what question the court actually did decide. We have repeatedly held that error is never presumed, but must be made to affirmatively appear, and in a case of this kind the motion should direct the attention of the court and opposite counsel to the precise point made and the grounds thereof. In other words, as was said by Fields, J., in *Kiler v. Kimball*, 10 Cal. 267, "the party must lay his finger upon the point of his objection." To the same effect, *McGarrity v. Byington*, 12 Cal. 429. "It is a wholesome rule," says Church, C. J., in *Schile v. Brokhahus*, 80 N. Y. 620, "that the attention of the court must be drawn to the precise point intended, otherwise an exception will not prevail." In *Edwards v. Carr*, 13 Gray, 238, Shaw, C. J., says: "It is very import-

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ant that no objection to a verdict be brought before this court by an exception which was not in some form taken at the trial, especially in a case where there is ground to believe that if it had been brought to the attention of the judge and adverse counsel, it might have been avoided by an amendment or by a more specific direction by the judge sustaining or overruling it. The party objecting would have the full benefit of his objection in matters of law, if well founded, either by a ruling in his favor or by an allowance of the exception, and the rights of both parties be secure." This court, in the case of *Kearney v. Snodgrass*, 12 Or. 311, has announced substantially the same rule. These rules have their foundation in a due regard to the fair administration of justice, which requires that when an error is supposed to have been committed, there should be an opportunity to correct it at once before it has had any consequences. The law should not permit a party to make a general motion, as in this case, and lie by without making the particular grounds of his motion known to the court, and take the chances of success on the grounds which the judge may think proper to put his ruling, and then if he fails to succeed with either court or jury avail himself of an objection, which if it had been stated might have been removed. This works no injustice to a party, for if there be merit in his motion or objection he has the full benefit of it, and if there be no merit he certainly ought not to succeed. In the midst of a trial at *nisi prius* the judge is necessarily compelled to rule upon many questions of law without the opportunity for deliberation the importance of the questions demand, and it is but an act of justice to him that such rulings be not reversed, unless his mind was specifically drawn to the point upon which the reversal was asked and acted upon as deliberately as time and circumstances would admit. In this case how can we say that the court below committed an error in overruling the motion unless we knew upon what grounds he was asked to allow it? His attention was not called to the points upon which we are asked

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to reverse the judgment, nor was there any suggestion as to what counsel would have him hold. Had the court below been asked to sustain this motion upon the grounds argued before us, we cannot say how it would have ruled, and certainly before we can be asked to reverse this judgment it must sufficiently appear that the court committed some error justifying such reversal.

It follows therefore that the judgment below must be affirmed.

[Filed November 10, 1890.]

J. M. McQUAID, RESPONDENT, v. THE PORTLAND & VANCOUVER R. R. CO., APPELLANT.

CIRCUIT COURT REPORTER—SHORTHAND NOTES—BILL OF EXCEPTIONS.—The shorthand notes of the circuit court reporter appointed under the act approved February 25, 1889 (Session Acts, 1889, pp. 142, 143, 144), when transcribed, certified and filed with the clerk as in the act provided, do not take the place of a bill of exceptions, nor can the supreme court review a question of fact in an action at law on said "notes."

MOTION FOR NEW TRIAL—RULING NOT REVIEWABLE.—The ruling of the trial court in refusing a new trial presents no question for review on appeal.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

There is no bill of exception in this record, and yet the only question which the appellant seeks to make on the appeal arises out of the effect of certain statements made by the plaintiff when on the stand as a witness in his own behalf. On his cross-examination, defendant's counsel asked him to estimate the amount of his damages, and the reporter certifies that he answered one thousand dollars. The jury gave a verdict for \$1,495. The defendant in due time moved to set it aside and to grant a new trial, which was refused, and this is the only assignment of error.

C. B. Bellinger, for Appellant.

Admissions of a party *in judicio*—admissions made in the course of legal proceedings, are conclusive upon him. Such admissions conclusively establish the fact admitted. 1 Greenleaf on Evidence, § 27. The appellant contends that this principle applies to admissions made by the party

19 685
21 612
25* 26
28* 639

19 535
133 423
34 578

19 535
147 34

19 535
148 439

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while under examination as a witness. If the admissions of a party made as a substitute for proof are conclusive of the fact admitted, *a fortiori*, his admissions made as proof should have the same affect.

The question in this case is as to whether the order appealed from is an appealable order. The general rule, that the order of the court in denying a motion to set aside a verdict and for a new trial is not appealable, is not questioned; but it cannot be questioned that if the case is one where it clearly appears that the court should have allowed the motion, the refusal to do so is an abuse of discretion and may be reviewed on appeal.

E. O. Doud, for Respondent.

First—Affidavits used on motion for a new trial form no part of the record, and cannot be used on appeal unless brought properly before the court by a bill of exceptions. *State v. Drake*, 11 Or. 396; *State v. Chee Gong*, 17 Or. 635; *State v. McGinnis*, 17 Or. 333.

Second—An order refusing a new trial will not be reviewed. All errors relied upon must be raised at the trial and they must be made to appear by the record. Proceedings excepted to during the trial must be brought into the record by bill of exceptions. *Scott v. Cook*, 1 Or. 25; *Taylor v. Patterson*, 5 *id.* 121; *Oregonian Railway Co. v. Wright*, 10 *id.* 162; *Newby v. Rowland*, 11 *id.* 133; *State v. Drake*, 11 *id.* 396; *State v. Clements*, 15 *id.* 247; *Kearney v. Snodgrass*, 12 *id.* 311; *State v. Becker*, 12 *id.* 318; *State v. Chee Gong*, 17 *id.* 635.

Third—The ruling of the court on a motion for a new trial is not assignable error. *Bowen v. Siate*, 1 Or. 271; *State v. Fitzhugh*, 2 *id.* 236; *State v. Wilson*, 6 *id.* 428; *State v. McDonald*, 8 *id.* 113; *Tucker v. Salem Flouring Mills*, 13 *id.* 28.

STRAHAN, C. J., delivered the opinion of the court.

There being no bill of exceptions in this case, the appellant relies upon the certificate of the official reporter. On February 25, 1889, an act entitled "An act authorizing the

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appointment of official reporters in the circuit courts, and prescribing their duties and fixing their compensation," was approved. Session Acts, 1889, pp. 142, 143, 144. Under section 2 of that act the reporter, when a full report is ordered, "shall cause accurate shorthand notes of the oral testimony or other proceedings to be taken." Section 3 provides for the reporter's compensation. Section 4, amongst other things, makes it the duty of the reporter, when shorthand notes have been taken in any case as in the act provided, if the court or either party requests a transcript of the notes, to cause a full, accurate type-written transcript of the testimony or other proceedings, which should be certified and filed with the clerk, for the use of the court or parties. Section 5 provides, in effect, that said report and proceedings, when transcribed and certified as correct, may thereafter be read in evidence as the deposition of a witness in the cases mentioned in section 829, Hill's Code.

These are the main features of the act on the subject presented by appellant's counsel, and we fail to discover anything in it that gives the reporter's notes the effect or makes it perform the office of a bill of exceptions. No doubt the object of the act was to enable the parties to put in available form the proceedings at the trial to enable them to make an accurate bill of exceptions, but it was never designed to thus make a substitute for that part of the record. If said notes could be so used, the transcript before us would be unavailable for another reason. It only purports to contain the plaintiff's cross-examination,—not all of his evidence,—and it does not purport to contain all the evidence given upon the trial.

We may add that if the question which counsel for appellant seeks to make were before us, we could not, in the absence of controlling authority, give to the evidence of a party when on the stand as a witness the effect of an estoppel by record. He occupies in a civil case the same situation of any witness affected by like motives and interest. The effect of his evidence and his credibility

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are for the jury, and it would be going too far for the court to declare as a matter of law that he is bound or estopped by every statement he makes. The verdict of the jury may have been excessive, If so, the court below had power to correct it by granting a new trial. That discretion is vested by law in the trial court, with which this court has never interfered. It presents no question for this court to review on this appeal.

We find no error in the record and the judgment appealed from must be affirmed.

[Filed November 10, 1890.]

L. L. CARTER, RESPONDENT, v. D. MONNASTES, APPELLANT.

APPEAL FROM JUSTICE COURT—FILING TRANSCRIPT—TIME.—Section 2125, Hill's Code, requires the transcript on appeal from a justice of the peace to be filed in the circuit court on or before the first day of the term next following the allowance of the appeal. This requirement is mandatory, and the circuit court has no authority to extend or enlarge the time.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

The plaintiff recovered a judgment before the justice of the peace of North Portland precinct on the twelfth day of December, 1889. Within the time allowed by law the defendant served a notice of appeal from the judgment, gave a proper undertaking, and the justice allowed the appeal in his docket. Thereafter, on the first day of January, 1890, of the circuit court of Multnomah county, the appellant appeared in court and obtained an *ex parte* order of said court allowing the appellant ten days in which to file the transcript. The transcript was filed within the ten days allowed by the court, but not by the first day of the term. Thereafter the respondent moved to dismiss the appeal for the reason the transcript had not been filed in the appellate court within the time allowed by law, which motion was allowed and the appeal dismissed. The appellant in the court below appeals.

Johnson & Idleman for Appellant.

John Ditchburn, for Respondent.

Points decided.

STRAHAN, C. J., delivered the opinion of the court.

But a single question is presented by this appeal, and that is, whether or not the circuit court had power to make the order enlarging the time for filing the transcript. Hill's Code, § 2125, provides: "On or before the first day of the term of the circuit court next following the allowance of the appeal, the appellant must file with the clerk of such circuit court a transcript of the cause," etc. The requirement is imperative, and a compliance with the statute was essential to give the circuit court jurisdiction of the cause. No doubt, as appears from the transcript, the appellant was hindered in the prosecution of the appeal by circumstances over which he had no control; and if the circuit court had the power, its order enlarging the time was proper, but no provision of the statute conferring such power has been brought to our notice, and we know of none. 1 Am. & Eng. Ency. of Law, 621.

We think the circuit court did not err in dismissing the appeal, and its judgment must be affirmed.

[Filed November 3, 1890.]

EDWIN MILLER, APPELLANT, v. JOSEPH W. BAILEY,
RESPONDENT.

PARTNERSHIP—DISSOLUTION—AGREEMENT.—If, upon the dissolution of a partnership, it is agreed that the partner continuing the business shall pay the debts, such agreement is broken by mere non-payment, and the outgoing partner can maintain a suit for the breach without having paid anything himself. And if a clause be added to save harmless, the former is not merged in the latter, and the obligee can rest upon either.

DISSOLUTION AGREEMENT—CASE IN JUDGMENT.—When, by the terms of a dissolution agreement, between B. and M., the latter retired from the firm and B. was to pay the outstanding debts and liabilities of the firm, and made a composition agreement with the firm's creditors whereby he was to pay fifty per cent of the firm's debts, upon payment of which B. was to be discharged but not M., and B. complied with the composition agreement and thereupon went to the principal creditor of the firm and asked him to sue B. & M. and collect his money from M., and upon the action being brought he made no defense and did not acquaint M. of the composition agreement or its terms, nor plead it himself as a defense, but made default, and M. paid a large sum of the partnership debts of B. & M.; held, that when sued for failing to comply with the dissolution agreement, B. was estopped from relying upon the supposed release created by the composition agreement, and the court declined to decide whether such release existed or not.

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APPEAL from Multnomah county: E. D. SHATTUCK, judge.

The substance of the complaint is, that on September 7, 1885, plaintiff and defendant were partners in a general retail grocery business in Portland, Oregon, under the firm name of Bailey & Miller; that on that day they were indebted to divers persons, and among others to Wadhams & Elliott in about the sum of \$1,500, about one-half of which was secured by note and the remainder an open account; that on that day plaintiff and defendant dissolved said partnership, and by an agreement then entered into for a valuable consideration, the defendant Bailey agreed to pay and satisfy in full all debts then existing against said firm of Bailey & Miller and all sums of money which were due or owing by said partnership (except a debt due Folger & Co.), including said \$1,500 due Wadhams & Elliott. And said defendant further agreed that he would at all times save and keep harmless and indemnify plaintiff against all and every person whatsoever, to which said Bailey & Miller or either of them were indebted in relation to said partnership and of and from all charges, actions, costs, damages, executions, judgments and demands whatsoever that might at any time arise against said plaintiff by reason of any matter or thing respecting or relating to said partnership, including all or any claims that might arise against the plaintiff or for which he might become liable on account of said debt due the said firm of Wadhams & Elliott. It is then alleged that defendant failed and neglected to keep said agreement as to said debt due Wadhams & Elliott or to pay same; and that on August 19, 1889, Wm. Wadhams, to whom Wadhams & Elliott had assigned their claim against Bailey & Miller, commenced an action against Bailey & Miller for \$1,162.90, then due on the promissory notes held by them against Bailey & Miller, and threatened to commence an action to recover the amount due on account; that defendant failed to pay said claims or to secure the withdrawal of said action; and that for his own protection the plaintiff was

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compelled to pay and did pay to said Wadhams on the twenty-fourth day of September, 1889, the sum of \$1,006.47, and that defendant fails and refuses to pay the same, etc.

The defendant's answer admits the agreement made on the dissolution of the firm of Bailey & Miller, and denies substantially all of the other material allegations of the complaint. The answer then alleges that on the twenty-fourth of November, 1885, defendant fully satisfied, paid and discharged all claims and debts owing, due or to become due, from or on account of the firm of Bailey & Miller to the firm of Wadhams & Elliott, and to other creditors of the said Bailey & Miller mentioned in a certain writing as follows:

"This agreement made and entered into this twenty-fourth day of November, A. D. 1885, between us, the creditors of J. W. Bailey—witnesseth: That whereas the said J. W. Bailey does justly owe us and is indebted to us, his several creditors, in the several amounts set opposite our respective names, but by reason of losses and disappointments in business he is unable to pay and satisfy us of our full debts and just claims and demands; now, therefore, we, the said creditors, have resolved and agreed, and by this agreement do resolve and agree, to undergo a certain loss, and to accept of fifty cents for every dollar owing by the said J. W. Bailey to us, the several and respective creditors, to be paid in full satisfaction and discharge of our several and respective debts, as follows, to wit: One-third of said indebtedness we agree to take in notes of Horace Ramsdell, dated of this date, payable on or before eighteen months from date, to each of us *pro rata*, without interest; and the balance of the fifty cents aforesaid, or one-sixth of our respective claims, we agree to take in notes of J. W. Bailey, dated of this date, payable on or before two years after date to each of us *pro rata*, with interest after one year at the rate of eight per cent per annum. And it is hereby further agreed that neither we, the said several and respective creditors, or any of us, nor the executors,

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administrators, partners or assigns of us, or either of us, shall or will at any time or times hereafter, sue, arrest, attach or prosecute the said J. W. Bailey or his property and chattels for any debt or thing now due to us or any of us, his respective creditors aforesaid; so as the said J. W. Bailey, his executors or administrators do well and truly pay unto us his said notes. In witness whereof, we have hereunto set our hands and the amount of our several claims opposite our respective names, the day and year first above written. This is to be construed as in no manner releasing Edwin Miller from his liability to us on said indebtedness. Wadhams & Elliott, \$1,526.38."

Then follow the signatures of a large number of Bailey & Miller's creditors with the amount due each firm set opposite. It is alleged that the sum of \$1,526.38 set opposite the name of Wadhams & Elliott was the amount due said firm by Bailey & Miller and the identical claim, a portion of which plaintiff alleges he paid on the twenty-fourth of September, 1889. That in compliance with said contract the defendant delivered his note for one-sixth the amount due Wadhams & Elliott, and has since paid the same and has performed every part of said contract by him to be done; that Ramsdell, in compliance with said contract, executed and delivered his note to Wadhams & Elliott for one-third of said sum. The answer further alleges that Bailey paid his note to Wadhams & Elliott on the fifth day of October, 1889; that Wadhams & Elliott knew of the retirement of said Miller and the agreement of defendant to pay them their claim, and that they thereafter settled said claim with said Bailey, and for a new and valuable consideration extended the time of payment of the same.

The reply denies the new matter in the answer, and then alleges that by composition agreement set out, Miller was not released. It is also alleged that at the time of Miller's payment to Wadhams, Bailey had not paid his note. It is then alleged that Bailey prompted and instigated Wadhams

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to sue Miller & Bailey on the partnership debt which is relied upon as an estoppel.

The plaintiff proceeded with his evidence, which tended to prove the material facts stated in the complaint; at the conclusion of which, on motion of defendant's counsel, the court non-suited the plaintiff for the reason he had failed to prove a case sufficient to be submitted to a jury. It may be proper to add that the witness Wadhams was allowed to state on cross-examination all facts in relation to said composition agreement, and what Bailey did under it. All the evidence is in the bill of exceptions. The remaining facts appear in the opinion.

A. L. Frazer, for Appellant.

F. A. E. Starr, for Respondent.

STRAHAN, C. J., delivered the opinion of the court.

In addition to the facts already narrated, it appears from the evidence that the defendant Bailey sent an attorney to Wadhams, who informed him that by then suing Miller he could collect the amount due from Bailey & Miller, and shortly afterwards the defendant himself called on Wadhams and prompted him to sue Bailey & Miller, and at the time said to Wadhams that there was a judgment to be entered up against him in favor of Miller or Miller's wife, and he would rather that Wadhams should have it as the balance of his claim against Bailey & Miller than that Miller should get it.

Before proceeding to consider the ruling of the court in ordering a non-suit, it is proper to ascertain some of the duties which Bailey owed Miller by virtue of the terms of the agreement of dissolution. By that agreement he was to pay all debts of every kind then due by Bailey & Miller with one exception; and at all times thereafter to save, keep harmless and indemnify Miller against all and every person whomsoever to whom Bailey & Miller were indebted (except one claim) in relation to said partnership, and of and from all charges, actions, damages, costs, etc., what-

Opinion of the Court—Strahan, C. J.

soever, and what has heretofore or shall at any time hereafter arise and come against said Miller for or by reason of any matter or thing respecting or relating to said partnership. If the contract be to pay the debts it is broken by mere non-payment, and the outgoing partner can maintain a suit without having paid anything himself. This is like a contract of indemnity, for it is affirmative. So is the covenant to pay the debts and save harmless. Here are two stipulations—one to pay, and one to save harmless or indemnify, and the former is not merged in the latter, and the obligee can rest upon either. And the covenant to pay is broken by non-payment, and a suit lies though the obligee has not actually paid. 2 Bates on Partnership, § 636. Bailey, then, being bound by the terms of the dissolution agreement to pay the Wadhams debt and to hold Miller harmless, could not relieve himself by making a composition agreement with Wadhams, including other creditors, and keep the terms secret. If that agreement operated to discharge both Miller and Bailey from their obligation to Wadhams, Bailey was bound, especially when he and Miller were sued for the same debt by Wadhams, to make known to Miller the terms of the agreement so as to enable Miller to plead it as a defense to the action. This Bailey neglected to do. Not only so, but, contrary to his agreement with Miller, he prompted and instigated Wadhams to sue Miller for the express purpose of compelling Miller to pay the debt which Bailey had covenanted to pay and to indemnify Miller against. Bailey did not even plead the agreement in his own defense when jointly sued with Miller, but allowed that action to go by default as to him. Under these circumstances we do not consider or decide whether the composition agreement discharged Wadhams' claim against Miller or not. Bailey would not plead that discharge against Wadhams when he had the opportunity, and when it was his duty to have done so, and he shall not now rely upon it for the purpose of defeating Miller's claim. The circumstances *estop* him.

Statement of facts.

This view of the case requires a reversal of the judgment of the court below and that the cause be remanded for a new trial, on principles not inconsistent with this opinion.

[Filed October 20, 1890.]

LEWIS LOVE, RESPONDENT, v. IDA MORRILL,
APPELLANT.

DISPUTED BOUNDARY—EQUITY—JURISDICTION OF.—(1) At common law to give a court of equity jurisdiction, in cases of disputed boundary, there must be, first, a dispute as to the boundary; and, second, some equity superinduced by the act of the parties. (2) The act of 1887 (Laws, 1887, p. 53,) was intended to and did give courts of equity jurisdiction in such cases where a mere dispute or controversy exists as to the boundary, without regard to any other equity. (3) Courts of equity have no jurisdiction to try purely legal titles disentangled of any equity. (4) Where in a suit under the statute it appears from the pleadings and evidence the only controversy between the parties is the legal title to a strip of land claimed to have been acquired by adverse possession, the complaint will be dismissed and the parties required to try the legal title at law. (5) Where the facts necessary to give a court of equity jurisdiction are stated in the complaint and are denied by the answer, the question of jurisdiction becomes one of fact to be determined on the hearing and is not waived; and where during the progress of the trial want of jurisdiction appears, it is the duty of the court to dismiss the complaint.

APPEAL from Multnomah county: L. B. STEARNS, judge.

This is a suit to establish the boundary or dividing line between lots 3 and 4, block 116, in the city of Portland, and brought under the act of the legislature "providing a mode of procedure in the matter of ascertaining, determining, establishing and marking boundary lines, where the same are in dispute, between adjacent lands." Laws of 1887, 53. Plaintiff and respondent is the owner of lot 4, and defendant and appellant of lot 3.

The complaint alleges that there is a dispute as to the boundary line between these lots, and describes the location of the line as claimed by plaintiff. The answer denies that there is any dispute as to this boundary line, but sets out what defendant claims to be the correct line, which is the same as the line claimed by plaintiff, except that one of defendant's buildings projects over some sixteen or eighteen inches on a portion of lot 4, and she claims that her line should be so run as to include that

19 545
22 459
24* 916
30* 162

19 545
23 270
23 296
23 301
24* 916
31* 602
31* 635
31* 658

19 545
37 129
38 530

19 545
40 493

19 545
42 565

19 545
47 178

Opinion of the Court—Bean, J.

part of lot 4 covered by this building. The answer also alleges title by adverse possession to all that part of lot 4 covered by defendant's buildings, being a strip sixteen inches wide at one end and nineteen inches at the other and about twelve feet long. The reply denies the adverse possession by defendant of this strip of land, and upon this issue the case was tried. There is no dispute, as disclosed by the evidence, between the parties to this suit as to the location of the line dividing lots 3 and 4; nor is there any dispute as to the boundary lines of that portion of lot 4 to which defendant claims to have derived title by adverse possession; but the real and only controversy is, as to the title to that portion of lot 4 claimed by defendant.

M. C. George, for Respondent,

Mitchell & Tanner and *R. R. Giltner*, for Appellants.

BEAN, J., delivered the opinion of the court.

The first question presented in this case is as to whether the act of 1887 applies or was intended to apply to cases of this kind. The determination of this question renders it necessary to first inquire what the common law rule is, and what innovation, if any, has been made therein by the statute in question. Issuing commissions to ascertain lost boundaries was a very ancient branch of equity jurisdiction, and where the boundaries between two adjacent parcels of land had become confused or obscure, equity has from an early period exercised a jurisdiction to settle them. The mere fact, however, that certain boundaries were in controversy was not of itself sufficient to authorize the interference of equity. In addition to the naked confusion of the controverted boundaries, before a court of equity would interfere there must have been suggested some peculiar equity which had arisen from the conduct, situation or relation of the parties. 3 Pomeroy Eq. §§ 1884, 1885; *Wolcott v. Robbins*, 26 Conn. 236; *Deveney v. Gallagher*, 20 N. J. Eq. 33; 2 Leading Cases in Equity, 318. Tyler on Boundaries, 266, 274; 2 Story's Eq. §§ 616, 621; *Wetherbee v. Dunn*, 36 Cal. 249.

Opinion of the Court—Bean, J.

Courts of equity would always take cognizance of controversies in respect to boundaries of land where courts of law did not afford adequate relief, or where equitable circumstances were shown calling for the interference of a court of equity. Although, as a rule, unless some statute exists upon the subject, the existence of a controverted boundary was not of itself a ground for relief in equity: other circumstances must be shown which seem to require the interposition of the court. Whenever such circumstances did exist, it may be observed that full and actual possession was sufficient to maintain a suit for settling boundaries. A strict legal title was never inquired into in cases of this kind. This was so declared in *Penn v. Lord Baltimore*, 1 Vesey Sen. 44, by Lord Hardwick, many years ago, and the rule has never been changed. Tyler on Boundaries, 266. Courts of equity would not grant relief unless it was shown that without the assistance of the court the boundaries could not be found, and this is the rule now unless changed by statute. Two things were requisite to give the court jurisdiction—first, a controversy as to the boundary, and, second, some equity superinduced by the act of the parties. In *Wake v. Congers*, 1 Eden, 331, it was established as a principle, which has been followed and maintained ever since, that the court has no jurisdiction to fix the boundaries of legal estates unless some equity is superinduced by the act of the parties. It was also held in *Godfrey v. Little*, 1 R. & M. 59, that a court of equity will not try title to land in a suit to establish boundaries. This question being purely legal, was one for the courts of law, assisted as they are in respect to the findings of fact by a jury. *Penn v. Baltimore*, 1 Vesey Sen. 44; *Norris*, Appeal, 64 Pa. St. 275.

As to what constituted a sufficient equity to give the court jurisdiction in cases of this character, soon became a vexed, uncertain and difficult question, and much conflict exists in the decisions of courts thereon. In this condition of the law the statute of this State was enacted, and was intended, we think, to give a court of equity jurisdiction

Opinion of the Court—Bean, J.

in cases where any dispute or controversy exists between two or more owners of adjoining or contiguous lands in this State concerning the boundary lines thereof, without requiring the existence of any other equity. It was intended to simplify the proceedings in cases of this kind, and to relieve suitors and courts from the difficult task of determining what facts would constitute a sufficient equity to give the court jurisdiction. It is only necessary under this statute that a dispute or controversy exists to give the court, by the aid of a commission, the power to settle and permanently locate or mark out upon the ground the disputed line. It was not the intention of the statute to withdraw cases relating purely to the legal title to land from the ordinary tribunals of law. The establishment of a line under this statute is not deemed to be nor does it acquire validity as a conveyance of a new title, but it simply ascertains and determines the extent of land held under preëxisting titles; in other words, it simply renders certain that which was before uncertain. This seems manifest from the first section of the act, which requires a dispute or controversy to exist concerning the boundary or dividing line, not a dispute or controversy concerning the title, in order to give the court jurisdiction, and also provides that a suit in equity may be maintained for the purpose of having such controversy or dispute determined and such boundary line or lines or dividing lines ascertained and marked by proper monuments upon the ground. The subject matter of the suit is the dispute concerning the lines and not the title, and the court is only authorized to ascertain and determine these lines, leaving all questions of legal title to be determined in the proper forum, unless there exists some equity independent of the controversy about the lines to give a court of equity jurisdiction to try the question of title. *Hinman, C. J.*, in the case of *Ecclesiastical Society v. Baptist Church*, 35 Conn. 119, uses the following language, which is peculiarly applicable to the case at bar: "Suppose a proprietor had encroached upon an adjoining proprietor for so long a time and under

such circumstances that he could not be divested of his possession, no one would claim that he could call upon the court to fix the boundary for him up to the line that he had occupied, and there is as little reason for claiming that his adjoining proprietor could call upon the court to determine by a committee where the original line really was so long as the original monuments which defined that line remained." Where the parties claim by adverse titles without any superinduced equity, the remedy is purely at law. 1 Storey's Eq., § 620; *Wethersbee v. Dunn*, 36 Cal. 249.

If, under this statute, the court should undertake to determine purely legal titles, when there is no dispute as to the boundary, as was said by Sharswood, J., in *Norris Appeals*, *supra*, "It would draw within the maw of a court of equity questions of a purely legal character which have heretofore been cheaply and expeditiously settled in courts of law with the necessarily accompanying rights of trial by jury." Under this statute where there is a dispute as to the boundary, a court of equity has jurisdiction to settle and determine the same, but this power cannot be invoked merely to try conflicting titles to land or to usurp the place of ejectment actions at law. The fundamental basis of equity jurisdiction is the want of a full and complete remedy at law, and indeed this is the provision of the statute of this State. 1 Hill's Code, § 380. The right to a trial by jury is guaranteed by the constitution of this State, and the act of 1887 must be read in the light of that provision. If the contention of respondent's counsel is to prevail and the construction suggested by him is adopted, there can scarcely be a limit to the right to have a court of equity adjudicate title to land in dispute between adjoining proprietors. The only question presented in the case at bar is the legal title to that portion of lot 4 covered by the building of defendant. This being a purely legal question, disentangled of any equitable feature, the remedy at law is adequate and complete and should be tried in that form (*Phipps v. Kelly*, 12 Or. 213) and does not come within the purview of the act of 1887.

Points decided.

It was, however, insisted, with much learning and ability by counsel for respondent, that defendant had waived the question as to whether a court of equity could try the title to this land by answering to the merits. The complaint is in the form prescribed by statute and states facts sufficient to constitute a cause of suit under its provisions. The answer tendered an issue on the material allegations of the complaint, which could only be determined from the evidence, and if it appears from the evidence that the real dispute between the parties is not cognizable by a court of equity, the complaint should be dismissed. The want of jurisdiction did not and could not have appeared until the evidence was taken, and therefore we fail to see how defendant is precluded from urging this question on the hearing in this court. When the facts necessary to give the court jurisdiction are stated in the complaint and are denied by the answer, the question of jurisdiction becomes one of fact, to be determined on the hearing, and is not waived; and where during the progress of the trial want of jurisdiction appears, it is the duty of the court to dismiss the bill. *Way v. Way*, 64 Ill. 406.

Having reached this conclusion, it is unnecessary to discuss the other questions presented in the case, and it follows that plaintiff's complaint must be dismissed. Since we have concluded that plaintiff's remedy is at law and not in equity, his complaint will be dismissed without prejudice.

[Filed November 3, 1890.]

TITUS TAYLOR, APPELLANT, v. S. A. MILES,
RESPONDENT.

TRUST—WHEN RESULTING.—When land is conveyed to one person and another pays the consideration, a resulting trust will be presumed in favor of the one paying the consideration. It rests on the equitable principle that the property belongs to him who advances the money to pay for it.

PAROL EVIDENCE—WHEN NOT ADMISSIBLE.—As the trust results from the payment of the consideration, if the party claiming to be the beneficial owner has made no payments he cannot show by parol evidence that the purchase was made for his benefit, for that may not involve anything more than a breach of a parol agreement to purchase and hold in trust for another.

19	550
130	278
19	550
33	504
19	550
38	510

Statement of facts.

PAYMENT NEED NOT BE IN MONEY.—It is not essential that the payment of the consideration be in money, but it may be made in anything of value.

PRESUMPTION OF PAYMENT WHEN BETWEEN STRANGERS.—The presumption that the party paying for the property intended it for his own benefit applies only when the transaction is between strangers, where there is no moral or legal obligation resting on the purchaser to pay the consideration for another.

WHEN INTENDED AS AN ADVANCEMENT.—When the purchaser takes conveyances in the name of his wife, the rule is reversed, and equity raises the presumption that the purchase and conveyance was intended as an advancement or gift.

CONVEYANCE TO WIFE—WHEN EFFECT TO HINDER CREDITORS.—If a purchaser takes a deed in the name of his wife for the purpose of hindering and delaying his creditors, and not for the purpose of making an advancement, a trust will result to the purchaser, and the land be liable for his debt.

CONVEYANCES WITHOUT CONSIDERATION.—The law enforces a careful regard for the rights of creditors against conveyances without consideration made by a party largely indebted, and unless he makes provision for the payment of his debts or retains other property of sufficient value for that purpose, they are of no validity as to such creditors.

WHETHER PAYMENT OF THE DEBT PURGES THE FRAUD, NOT DECIDED.—Whether a party largely indebted can put his property in the hands of another to hold until he can pay his debts, and when the debts are so paid the transaction will be relieved of its fraud, not decided.

CASE STATED.—Where a party, in order to secure his property against the claims of his creditors, conveyed it to another to hold until he could pay his debts, and after such debts were paid, directed it to be conveyed to his wife; and subsequently joined with her in a deed in exchanging said property for other property with C.; *add*, that no trust resulted to him in such property.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

This is a suit in equity brought by the plaintiff to quiet title and to have a trust declared in certain lands described and lying in East Portland standing in the name of his wife, Elizabeth Taylor, now deceased. The plaintiff alleges that now and since the sixteenth day of December, 1869, he has been the owner and in possession of the said property, describing it; that on that day he purchased and paid for said described property and had the legal title to the same conveyed to his wife, Elizabeth Taylor, in trust for himself; that she received such title in trust for him and agreed to hold it subject to plaintiff's directions and control, and to convey the title to him when demanded; and that in case of her decease, before the property was otherwise disposed of, she would leave a will devising the legal title to the plaintiff; that on the thirtieth day of April, 1882, the said Elizabeth Taylor made her will devising said property to the plaintiff and died on that day, and that the defendant claims an estate or inter-

Opinion of the Court—Lord, J.

est in said property adverse to the plaintiff, etc. The defendant, by his answer, after denying the facts as alleged, sets up affirmatively (1) that the said Elizabeth Taylor was seized in fee simple of said lands, and that she died intestate, leaving no heirs at law except three daughters, naming them, each of whom inherited an undivided one-third of said property, etc., and that the defendant, by a regular chain of conveyances, has succeeded to the interest of two of such heirs, and (2) that the plaintiff ought not to be permitted to maintain his suit on account of facts alleged to create an estoppel, etc. Upon issue being joined, the evidence was taken and submitted to the court, which being duly advised by argument, after mature deliberation found that plaintiff had no right or title in the described lands, except an estate by curtsy, and that the said Elizabeth Taylor did not hold the same in trust for plaintiff nor subject to his direction and control; that she did not make a will devising the said property to the plaintiff, but that she was the owner thereof in fee simple, and that the defendant had succeeded to her right in an undivided two-thirds thereof subject to the curtsy of the plaintiff, and thereupon decreed that the plaintiff had no right, title or interest therein except an estate by curtsy for his own life, and that the defendant is the owner in fee simple of an undivided two-thirds of said land, subject to said estate by curtsy, etc. From this decree the present appeal is brought.

A. L. Frazer and E. B. Williams, for Plaintiff.

B. Killin and W. E. Thomas for Defendant.

LORD, J., delivered the opinion of the court.

The question raised by this record is, whether upon the facts the wife of the plaintiff held the property in dispute in trust for him or in her own right as the intended beneficiary of it. Where one purchases an estate and pays for it and takes the title in the name of another, or where one purchases land with the money of another and takes the title to himself, there arises by operation of law a

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resulting trust in favor of him whose money paid for it. *Parker v. Newitt*, 18 Or. 274. It rests upon the equitable principle that the property belongs to him who advances the money to pay for it, or that the beneficial ownership follows the consideration. But as the trust results from the payment of the consideration, if the party claiming to be the beneficial owner has made no payments, he cannot show by parole evidence that the purchase was made for his benefit, for that might involve no more than a breach of a parole contract to purchase and hold in trust for him. Nor is it essential that the payment or the consideration be in money, but it may be made in anything of value. "It is sufficient," said Wells, J., "if that in fact which formed the consideration of the deed moved from the party for whom the trust is claimed to exist, or was furnished in her behalf or on her credit. The trust results from the purchase and payment of the consideration by or for one party and the conveyance of the land to another. The receipt of a deed founded on such a transaction raises a presumption that it was taken for the benefit of the party supplying the consideration." *Blodgett v. Hildreth*, 108 Mass. 487. As a consequence, it follows that a trust must arise, if at all, at the time of the conveyance, and that the money or other consideration for the deed, which is the foundation of the trust, must then be paid or secured to be paid. *White v. Carpenter*, 2 Paige Ch. 238. The resulting trust must arise at the time of the purchase, and cannot be created afterwards. But the presumption that the party paying for the property intended it for his own benefit applies only when the transaction is between strangers, where there is no natural or legal obligation resting on the purchaser to pay the consideration for another. When the purchaser takes the conveyance in the name of his wife the sale is reversed, and equity raises the presumption that the purchase and conveyance was intended to be an advancement or gift.

"Whenever," says Mr. Pomeroy, "the real purchaser—the one who pays the price—is under a legal or even a

Opinion of the Court—LORD, J.

moral obligation to maintain the person in whose name the purchase is made, equity raises the presumption that the purchase is intended as an advancement or gift, and no trust results." 2 Pom. Eq. § 1039. But if a husband purchases an estate and pays the consideration thereof, and procures the title to be conveyed to his wife with the understanding that she shall convey the same to him when demanded, she has no such beneficial interest in the property that will in the event of her death, while holding the title as against the husband, descended to her heirs. It is the payment of the purchase money by the husband that creates the trust, and the agreement to so hold and convey when demanded may be shown in evidence to rebut the presumption that the property was conveyed to the wife as an advancement. *Cotton v. Wood*, 25 Iowa, 46. Again, if the purchaser takes the deed in the name of his wife or child for the purpose of defrauding or delaying his creditors, and not for the purpose of making a settlement or advancement, a trust will result to the purchaser and the land be liable to his debts. *Guthrie v. Gardner*, 19 Wond. 414; *Belford v. Crane*, 1 C. E. Green, 265.¹ When, however, a party holding real estate in his own right, in order to secure it against the claims of his creditors, makes a conveyance of it to another without any valuable consideration, who accepts the conveyance upon a secret trust for such party's use, it is void as to existing creditors and the land is liable for his debts. Nor can a party largely indebted give or convey away his property in disregard of the claims of his creditors, and escape the suspicion that the transaction originated in fraud. The fact may be that no fraud was intended, but if they operated to the prejudice of his creditors and delay and hinder them, such conveyance will not be upheld or allowed to defeat the payment of their claims.

The law enforces a careful regard for the rights of creditors against conveyances without consideration, made by a party largely indebted; and unless he makes provision for the payment of his debts, or retains other property

(1) 84 Am. Dec. 155.

of sufficient value for that purpose, they are of no value as to them, and may be set aside and appropriated to the payment of their claims. These principles are elementary and the justice of them so obvious that no citations are necessary to sustain them.

Turning now to the evidence, it only remains to apply these principles to it and declare the result. For convenience, it may be best first to briefly trace the line of conveyance to the property in dispute. The plaintiff was the owner of a tract of land upon Suavie's island, the greater part of which he and his wife conveyed to one Nelson Hoyt; that shortly thereafter, by direction of the plaintiff, Hoyt conveyed the same to the wife of the plaintiff, and that in the year ensuing the plaintiff and his wife exchanged this land for the land in dispute. Taking these transactions separately, the testimony shows that in the month of January, 1868, the plaintiff being in debt and fearing that his creditors would subject his property to its payment, conveyed to one Nelson Hoyt 120 of 160 acres of land that he owned on Suavie's island, and that the said Hoyt accepted the conveyance upon a secret trust for the plaintiff's use. This trust, the testimony of the plaintiff shows, was to hold it for him until he could raise the money to pay his debts. Shortly thereafter he directed Hoyt to convey this land to his wife, Elizabeth Taylor, not, however, as the plaintiff claims, until he had fully paid his creditors. But the only proof of such payment is the declaration of the plaintiff. Hoyt says that when he conveyed at the plaintiff's request the property to his wife, "the plaintiff said he had paid up his debts." No receipts or vouchers or other evidence of payment were offered to establish this important fact, nor was any creditor called to show that he had received payment for his debt. But on the other hand, there was the testimony of one of the creditors, produced by the defense, tending to show that his debt was not paid at the time Hoyt conveyed this property to Elizabeth Taylor. If that were true, the original transaction was not purged of its fraud,

Opinion of the Court—Lord, J.

and Elizabeth Taylor took the property subject to the debts of the plaintiff's creditors. It may be true that the motive that induced the transfer of the property to Hoyt was not fraudulently intended, but it is not questioned that it did not operate to the prejudice of the creditors of the plaintiff, only that when the same property was conveyed by Hoyt to his wife that the debts of his creditors had been paid. The law is plain that a person indebted cannot convey his property to another without consideration, unless some provision is made for the payment of his creditors, without the transaction being regarded as fraudulent.

As between the plaintiff and his creditors, the conveyance from him to Hoyt was void, and as between plaintiff and Hoyt equity would have refused its aid to the plaintiff to reclaim his property from him. And the argument of counsel concedes that if the debts were not paid when Hoyt at his request conveyed the property to his wife, the original transaction was not purged of its fraud and the land went into her hands with that fraud still clinging to it and liable for her husband's debts. Whether a party largely indebted can put his property in the hands of another to put it out of the reach of his creditors, and to hold until he can pay such debts, and then if he is fortunate enough to succeed in paying them, claim that the transaction is purged of its fraud, we do not nor is it necessary for us to decide. But for the purposes of this case we may assume the correctness of the argument that the debts were paid when Hoyt conveyed to Mrs. Taylor, and the original transaction was purged of its fraud, so that when she took the deed for it the property stood free from all fraudulent impediments. What then? As the case now stands, Hoyt was merely an intervening trustee for the plaintiff to convey his property to his wife. In effect, the transaction was the same as if the deed had been made directly from the plaintiff to his wife. Here no consideration was paid to Hoyt who conveyed to the wife. The plaintiff conveyed by deed to Hoyt and Hoyt conveyed by

Opinion of the Court—Lord, J.

deed to plaintiff's wife. No money or other valuable consideration passed. The plaintiff was not a purchaser nor Hoyt a seller. It was the plaintiff's conveyance through Hoyt to his wife. There is no evidence nor is it alleged or claimed that there was any understanding that Mrs. Taylor was to hold this property subject to the control of her husband. The testimony of Hoyt is explicit that nothing was said at the time of that conveyance except that the plaintiff requested him to deed the property to his wife. It is difficult to understand how the equitable principle that when land is conveyed to one person and another pays the consideration, a resulting trust will be presumed in favor of the one paying the consideration upon such facts. The trust is based upon the fact of the payment of the purchase money by the husband for the property; and as we have already shown, no consideration was paid to Hoyt who conveyed to the wife nor was the plaintiff a purchaser nor Hoyt a seller. The plaintiff simply conveyed his property through Hoyt to his wife. It was his conveyance through Hoyt. The equitable principle that a resulting trust will be presumed in favor of the one paying the consideration, is not applicable to such facts. This is not a transaction of that kind. Nor can it apply for another reason, namely, that the presumption of a resulting trust in favor of him who supplies the consideration only applies between strangers, and has no application where a family relation exists, and there is no moral or legal obligation for the purchaser to pay the consideration. When the purchaser takes the conveyance in the name of his wife, for whom he is under a legal obligation to provide, the rule is reversed in the application, and between such parties the presumption is that the payment by the husband was intended as an advancement or gift.

A man cannot give away his property today and take it back tomorrow; and if he makes his wife the owner the same result follows, and he must abide by her ownership. As we have shown, the authorities to this point speak

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without a dissentient voice. It results that the conveyance of the Sauvie's island property to the wife made her the owner of it, and the plaintiff must abide by that ownership. Yet the plaintiff claims that when he and his wife joined in a deed of this property, containing 120 acres, and 40 acres belonging to him, to one Clark, in exchange for the East Portland property, the property in dispute which Clark deeded to his wife, he purchased and paid for the property in dispute, and that at the time of such conveyance to his wife she agreed to hold it subject to his direction and control, and that in the event she should die before him she was to will it to him, and that in accordance with such agreement just before her death she made a will of it to him, although it was void by reason of an omission to name any of the children in the will. This proceeds upon the theory that the plaintiff paid the consideration money or that it was his property that constituted the consideration for the property in dispute at the time of its conveyance to his wife, when the fact is that the great part of the consideration was composed of her property, and only a small part—40 acres—was composed of his property. Of what value this 40 acres was, there is no evidence, but presumably it is of very little value as it was not regarded of sufficient consequence to be included in the conveyance of Hoyt to protect it against the claims of his creditors, so that the *pro rata* part of the consideration be paid for the property in dispute is not ascertainable. That there is some testimony tending to show that his wife recognized the property in dispute as belonging to him, may be admitted, although there is some other evidence in contradiction of it. Hoyt says that once when Mrs. Taylor was at his house she remarked that if she died before the plaintiff, she intended to will the property to him; that she wanted him to have it. This referred to the property in dispute, but there is nothing in this inconsistent with her ownership. So, too, McNulty says that in 1879, after she had had the property in dispute about ten years, in a conversation in which she claimed the property and her

husband disputed it, she afterwards said she was only joking.

It is hardly necessary to consider this in the view we take of the facts. A trust arising by operation of law must arise at the time of the transaction, and cannot be created afterwards. As Chancellor Kent said: "The trust must have been coeval with the deeds, or it cannot exist at all." *Botsford v. Burr*, 2 John. Ch. 405. It must result from the original transaction at the time it takes place and cannot be misled and confounded with any subsequent dealings. A trust must have been impressed upon the Sauvie's island property at the time it was conveyed by Hoyt to Mrs. Taylor by operation of law to affect the property in controversy. If no trust was created at that time, but she took the property as her own, that ownership remains until she legally transfers or disposes of it. We have shown that in any view that transaction must be regarded as a conveyance to the wife, conferring upon her the ownership of that property; that no trust attached to it by implication of law at the time Hoyt transferred it to her.

Now as that property—the property belonging to Mrs. Taylor—constituted the main consideration for the property in dispute, and the deed was taken in her name, no trust could result and the property become her own. The whole foundation of a resulting trust is the payment of the purchase money, which must be clearly and satisfactorily established. As this was not paid by the plaintiff, but by his wife, no trust could result to him, and the bill should have been dismissed. This view renders it unnecessary to consider some other aspects of the case or to express any opinion concerning the same.

The bill is dismissed, and it is so ordered.

Statement of facts.

[Filed November 3, 1890.]

AMOS N. KING ET AL., RESPONDENTS, v. JOHN R.
BRIGHAM ET AL., APPELLANTS.

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31* 602

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139 474

19 560
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42 244

19 560
47 192

BOUNDARIES—MONUMENTS CONTROL COURSES AND DISTANCES.—The actual location of lines and monuments on the ground will control over courses and distances, and if such monuments can be found the courses and distances must give way. *Lewis v. Lewis*, 4 Or. 173, approved.

EVIDENCE—SUFFICIENCY OF.—Where it is claimed lines and monuments do not agree with courses and distances, the evidence of their actual location must be as clear and satisfactory as to establish that fact to the entire satisfaction of the court or jury and to place beyond question the actual location of the lines or monuments.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

This is a suit brought under the statute of 1887 (Hill's Code, §§ 506, 510,) by the respondents and against J. R. Brigham, A. D. Tufts, Henry Fleckenstein, S. Julian Mayer, David Cole, D. Cavanaugh, Peter Esser, Mary Soderstrand and the city of Portland, to settle a disputed boundary between the King and Lownsdale donation land claims in Multnomah county, Oregon. The complaint is in the usual form, averring: "That the said boundary line between the lands aforesaid is as follows, to wit: Commencing at a point in the east boundary line of the Amos N. King donation land claim, which point is the northwest corner of the W. W. Chapman donation land claim, and also the southwest corner of the D. H. Lownsdale donation land claim (this corner was marked by a stone monument), thence northerly along the east boundary line of the Amos N. King donation land claim to a point which is ninety-three (93) feet easterly, measured along the south boundary line of B street in said city, from a point where the south boundary line of said B street is intersected by the west boundary line of Fourteenth street in said city, as extended by the common council of said city of Portland, county of Multnomah and State of Oregon, said line being the easterly boundary line of the said plaintiff's land and the westerly boundary line of the defendant's land."

The separate answers of each of the defendants, except the city of Portland, are substantially the same and deny

Statement of facts.

that the boundary line commences on the east boundary line of the Amos N. King donation land claim, other than as hereinafter set forth, or that said point is the northwest corner of the W. W. Chapman and D. H. Lownsdale donation land claims, or that said line runs thence northerly along the east boundary line of the Amos N. King donation claim to a point which is 93 feet easterly, measured along the south boundary line of B street from a point where said B street is intersected by the west boundary line of Fourteenth street, as alleged by plaintiff, or that said line is the easterly boundary line of plaintiff's lands or the westerly boundary line of the lands belonging to these defendants. These defendants, further answering, allege "that the true and correct east boundary line of the A. N. King donation land claim, as established by the proper officers of the United States to said King, commences at a point on the base line, which is three chains east of the southwest corner of the southwest quarter of section 33, township 1 north, of range 1 east of the Willamette meridian, and running thence north $20^{\circ} 15'$ east 20.60 chains to a point near and intersecting the south line of B street, as now laid out and existing in said city of Portland, county of Multnomah and State of Oregon; and that the southwest corner of the donation land claim of said D. H. Lownsdale and Nancy Lownsdale, as established by the officers of the government of the United States and patented to them, commences at a point on said line last described north $20^{\circ} 15'$ east and 6.15 chains distant from the said commencement point of said King's donation land claim; thence running north $20^{\circ} 15'$ east 14.45 chains intersecting and near the south boundary of said B street, and distant in a westerly direction from the west line of Fourteenth street, as originally laid out, 77 feet, more or less, to the said east line of King's donation land claim and the west boundary line of said Lownsdale donation land claim as herein set forth. And for a further answer, these defendants plead adverse possession for more than ten years.

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The reply denies the new matter set up in the answer, including the adverse possession of the defendants.

The answer of the city of Portland, after denying and alleging substantially the same facts concerning the true boundary as in the answer of the other defendants, alleges that there is a public street through the lands of defendants Brigham and Tufts.

The cause was referred to a referee to report the testimony and conclusions of fact and law; and on the coming in of his report, the court below modified the same and found "that the eastern boundary line of the donation land claim of Amos N. King and the western boundary line of the donation land claim of Daniel H. and Nancy Lownsdale, as originally run, is a line commencing at the stone monument at the northwest corner of the donation land claim of W. W. Chapman, which is also the southwest corner of the donation land claim of Daniel H. and Nancy Lownsdale; and thence running northerly on a line north — degrees east to a point in the south line of John H. Couch donation land claim, which is seventy (70) feet from the west line of Fourteenth street in the city of Portland, Oregon, sometimes called 'Old Fourteenth street.'" The court also found that by reason of adverse possession of the plaintiff Amos N. King, as found by the referee, he, said Amos N. King, is the owner in fee simple of all the lands described in the complaint which lie north of the south line of Morrison street, if extended westerly, and west of a line running north 20° 15' east from the stone monument at the northwest corner of the W. W. Chapman claim to the south line of the John H. Couch donation land claim, where there is an iron post set by C. W. Burrage. A decree was entered against the city of Portland, adjudging that Morrison street does not extend further west than the west line of Fourteenth street. A decree was then entered establishing the line between plaintiffs and defendants Cole, Cavanaugh, Soderstrand and Esser as one running from the stone monument at the southwest corner of the Lownsdale claim to a point in the south line of the

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Couch claim, which is 70 feet west of the west line of Old Fourteenth street, and between plaintiffs and defendants Brigham and Tufts as a line running from the stone monument at the northwest corner of the Chapman claim north $30^{\circ} 15'$ east to the iron post set by C. W. Burrage in the south line of the Couch claim. From this decree, the defendants Brigham, Tufts and Cole appeal. The facts sufficiently appear in the opinion.

R. & E. B. Williams and C. H. Carey, for Appellants.

Killin, Starr & Thomas and Moreland & Masters, for Respondents.

BEAN, J., delivered the opinion of the court.

The matter sought to be established in this suit is the true location of the boundary line between the donation land claims of A. N. King and Daniel H. Lownsdale in Multnomah county, Oregon. In March, 1852, King, Lownsdale, and W. W. Chapman filed upon adjoining donation claims on what was then unsurveyed public lands. The initial point of the King and Chapman claims, as stated in the notifications of the respective parties, is the same, being 3.00 chains east of the southeast corner of the southwest one-fourth of section 33, township 1 north, range 1 east. According to the calls of the notification, certificates, field notes and patent of the King claim, this boundary line runs from the initial point north $20^{\circ} 15'$ east 20.60 chains, this line being the one in dispute in this case. The Chapman claim from the initial point, according to the notification, runs north $20^{\circ} 15'$ north 6.15 chains; but the initial point as mentioned in the field notes of the survey, and in the certificate of the Chapman claim, is .04 chains further east than as stated in the notification, and the course as given in the field notes and certificate is north $20^{\circ} 45'$ east, in place of north $20^{\circ} 15'$ east, as given in the notification. The Lownsdale claim is what is known as a legal subdivision claim. The original plat map of the survey of the claims of King, Chapman, and Lownsdale, as approved by the surveyor-general, shows the eastern

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boundary line of the King claim and western boundary line of the Chapman and Lownsdale claims to be a common line, and the southeast corner of the King claim to be the southwest corner of the Chapman claim, and the northwest corner of the Chapman claim to be the southwest corner of the Lownsdale claim; but the field notes of the survey of these claims, as made by the United States deputy surveyor, do not mention or refer to any point or monument as common to the respective claims or as common to any of them. There are stone monuments at the southeast corner of the King claim and the northwest corner of the Chapman claim which are conceded in this case to have been located at the place designated by the government surveyor as the original corners of these claims. There is no dispute in this case as to the correct location of the original initial point of the King claim on the base line. It is also conceded by plaintiffs that a line projected from the initial point of the King claim and running thence north $20^{\circ} 15'$ east 20.60 chains, the course and distance according to the calls in the notification, certificate, field notes and patent of the claim, will intersect the southern boundary line of the Couch claim about seventy-five feet westerly from the western boundary line of Fourteenth street, sometimes called "Old Fourteenth street." This is the line defendants claim to be the true boundary line between the King and Lownsdale claims, and, therefore, it will be observed that plaintiffs admit at the outset of this case that the line defendants are contending for is the correct line as called for by the course and distance given in the notification, certificate, field notes and patent of the King claim; but they seek to avoid the force of this fact, by claiming (1) that since the King, Chapman, and Lownsdale claims are or were intended to be adjoining claims and to have a common division line, that the true boundary line between them should be extended from the southeast corner of the King claim through the northwest corner of the Chapman claim to the intersection with the Couch claim at the point on B

street where there is an iron rod, set by C. W. Burrage; (2) that the location of the original northeast course of the King claim by the deputy United States surveyor has been established by the evidence and should control over courses and distances, this corner being, as plaintiffs claim, at the point in B street where the iron rod is located; and (3) that a line extended east from the located corner of the King claim, being the southwest corner of the Couch claim, and in this case known as the corner under Judge Stearns' house, according to the course and distance given the field notes of the King claim, will establish the southeast corner of the claim at the point in B street where the iron rod before referred to is located. These claims we will notice in the orders claimed:

1. The southeast corner of the King claim is the last corner established by the government surveyor in running the exterior lines of the claim. The field notes show the claim was surveyed by commencing at the initial point in the base line and running thence north $20^{\circ} 15'$ east 20.60 chains, and so on around the claim to the southeast corner, and thence a certain course and distance to the place of beginning. There is no reason shown in this case why this corner is any more nearly correct than any other known corner of the claim, and certainly no sufficient reason was suggested by counsel why it should prevail over the known initial point of the survey, and we have been unable to find any. The claim that the northwest corner of the Chapman donation should govern in the location of the line in dispute may be disposed of by saying that such corner is nowhere mentioned or referred to in the courses or distances given in the field notes, notifications, certificate or patent of the King claim, nor mentioned as one of the calls in the description of such claim; and besides, the field notes of the Chapman claim show that the initial point of the claim is four links east of the initial point of the King claim, and the course is 30° east of the corner of the King survey, so that according to the field notes of the two claims, the northwest corner

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of the Chapman donation must necessarily be east of the line of the King claim in dispute in this case, and any line extended from or through this corner cannot be the true east boundary line of the King claim.

2. The law is well settled in this State that the actual location of the lines and monuments on the ground will control over courses and distances, and if such monuments can be ascertained the courses and distances must give way. *Raymond v. Coffey*, 5 Or. 132; *Goodman v. Myrick*, 5 Or. 65; *Lewis v. Lewis*, 4 Or. 178. The initial point of the King claim being undisputed, if the monument at the northeast corner of the claim as actually located can be ascertained, the boundary line in dispute will be a straight line from the initial point to such corner. Mr. King, one of the plaintiffs, is the only witness who undertakes to testify of his own knowledge concerning the actual location of this corner. He says that he saw Leland, the deputy United States surveyor, who surveyed his claim, set a post at the northeast corner thereof in 1859 or 1860, but that he cannot tell what became of the post or how long it remained, but thinks at least two years; that afterwards he fenced in a small field, the east line of which was on the line as surveyed by Leland, but he would not be positive whether he built the fence while the stake was there or not, but the witness tree was there. "Too long ago; can't tell when he fenced it, but the fence stood over twenty years and until new Fourteenth-street bridge was built. The fence was thirty or forty feet from the post and a little east of it. And the north end of the fence was thirty or forty feet from the east end of the bridge. Think the fence did not run quite up to the post. There was a pretty steep bank there—a kind of cove. It might be ten or fifteen feet from the post to the end of the fence. The fence run southerly something over two blocks, a block and a half. I would not be positive in this."

Mr. E. J. Jeffrey testifies that King pointed out the stake to him some twenty-one or twenty-two years ago. "My memory is that it was a wooden stake; nothing peculiar

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about it that I can remember. B street has since been filled. This street has been filled over sixteen years, I think. Saw old fence supposed to be on the line. This fence was built in 1868 or 1869 and remained until new Fourteenth-street bridge was built in 1883. The stake pointed out to me by King was nearly thirty feet east of new Fourteenth-street bridge. The fence ran nearly parallel with the fence then and now standing west of the property claimed by Cavanaugh, Soderstrand and Brigham and Tufts. Don't understand the post I mentioned as the post to designate a corner of the King claim, with reference to the compromise line with Couch. All I know about it being the northeast corner in B street is what Mr. King told me."

J. E. Oliver, another witness for plaintiffs, says that prior to the building of the new Fourteenth-street bridge, there was an old fence that ran along. "To the best of my recollection, it started off the hill at this side of the gulch, about the end of the bridge in the south side; run north and would intersect B street about thirty feet east of Fourteenth-street bridge. That is as near as I can come to it, to the best of my recollection; everything has changed so. In some respects things have changed so in that neighborhood during the last fifteen years that my memory is very indistinct in regard to location; in other it is not. Don't know where the King east line is other than what Mr. King told me."

This is substantially all the testimony of plaintiffs as to the actual location of the northeast corner of the King claim. On the part of the defendant, W. S. Chapman testifies that while he was city surveyor from July, 1872, to July, 1874, he ran the east line of the King claim, commencing at the initial point and running on the course and for the distance called for in the original field notes of the survey, and that the line so run would bring the corner about fifteen or twenty feet north of the south line of B street and between seventy and eighty feet west of the west line of old Fourteenth street, and he thinks about

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fifteen or twenty feet west of the east line of new Fourteenth street. Being asked if he discovered any post or witness tree in what is now new Fourteenth street in the north line of the King and south line of the Couch claim, he says: "I started from King's initial point and ran the course and distance which brought me to what ought to be his northeast corner. I then looked about for the witness tree called for in the notes. This I found, it having been blown over, falling northward; about one-half of the large roots on the main side of the tree being in the ground and still connected with the trunk of the tree, about thirty feet of which was still in tact, the balance of the tree having been cut up and hauled away. On this tree, on the under side thereof and a quarter of the way from the under side, from the middle of the under side, to the middle of the west side of the tree I discovered the letters 'C 51.' I should now think that that tree was fully thirty-six inches in diameter at the time I speak of. I made allowance by careful measurement so as to get the position of the bearing tree when it was standing erect. Then I laid off the course and measured the distance stated in the field notes, and at such distance set a post for the true northeast corner of the A. N. King donation land claim. I then ran the west line of old Fourteenth street and took the distance from the west line of old Fourteenth street to this corner as set by me, which distance I found to be seventy feet."

This corner claimed to have been found by Chapman corresponds with the description of this line as found in the field notes of the King survey. It appears from the testimony that soon after the Chapman survey, the old fence referred to by King, Jeffrey and Oliver was torn down and has never been replaced, and that parties owning property south of where the old fence stood moved their fences on to the line as surveyed by Chapman and have maintained them there ever since; and as far as the evidence in this case shows, without objection from King; and further, the testimony of Tufts and Mayer, who were

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desirous of purchasing property along what is now the disputed line, tends to show that Mr. King did not claim that his line extended east of the line as run by Chapman. While the rule of law is as heretofore stated, that actual location of the lines and monuments on the ground will control over courses and distances, we think that where it is claimed that such lines and monuments do not agree with the courses and distances, the evidence of their actual location should be so clear and satisfactory as to establish that fact to the entire satisfaction of the court and to place beyond question the actual location of the line or monument. In this case, after a careful examination of the evidence, we are not satisfied that the actual location of the corner as claimed by King has been proven by that clear and satisfactory testimony the imperative requirements of the law demands. The stake only stood for about two years; no effort was made to preserve it; and the fence by which it is sought to establish the location of the corner was not built until 1868 or 1869, some six or seven years after it is admitted the stake disappeared. Mr. King himself could not have been very positive about the matter, else he would not have permitted the fence to be torn down after the Chapman survey, and especially he would not have permitted parties owning property along this line to have enclosed and occupied up to the Chapman line from 1874 to the commencement of this suit without objection on his part. So that if there was no other evidence as to the location of the corner but that offered by plaintiffs we would be compelled to hold it unsatisfactory; but when taken in connection with Chapman's testimony, we are irresistibly led to the conclusion that Mr. King must be mistaken as to the location of the stake set by Leland. It is true Mr. King attempts to account for the witness tree found by Chapman by saying that it must have been a witness tree for the stake set by the surveyor who surveyed his claim in 1850, and that afterwards Chapman, Lownsdale and himself, by mutual agreement, changed the line in question by making the corner further

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east. If such an agreement was ever made, it must have been before King filed on his claim, for there is no evidence in this case of any change in his original filing, and the field notes of the survey made by Leland, some seven or eight years afterwards, correspond with the courses and distances given in the original notification. The court below found the true northeast corner of King's claim to be according to the Chapman line, but held the true east boundary line of the claim to be a line from the northwest corner of the Chapman claim to this corner, by commencing at the northwest corner of the Chapman claim to extend the line. For the reasons already stated, we think the learned judge was in error.

3. What has already been said about the uncertainty of the southeast corner of the King claim, as a proper monument from which to extend the east line of the claim, applies to the corner at the southwest corner of the Couch claim, with this additional suggestion, that the evidence shows that this corner was established by a surveyor who surveyed the Couch claim, and as a corner of that claim, and not of the King claim. The court below, while finding the northeast corner of the King claim to be as claimed by defendants, nevertheless held that the plaintiffs had acquired title by adverse possession up to the line as claimed by them as against appellants Brigham & Tufts. In this we think there was error. The evidence shows that Mr. King held this possession, under mistake or ignorance as to his true line, and with no intention to claim beyond the true line when discovered. Such a possession is not adverse, and cannot ripen into a title as against the real owner. *Caufield v. Clark*, 17 Or. 473; 11 Am. St. R. 845.

It follows, therefore, as to these appellants, the decree below must be reversed. And between them and plaintiffs the boundary line established was a line run as follows: Commencing at the point on the base line 3.00 chains east to the southeast corner of the southwest one-fourth of section 33, township 1 north, range 1 east, in Multnomah county, Oregon; running thence north 20° 15' east 20.60 chains to

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a point near and intersecting the south line of B street in the city of Portland; and that this suit be remanded to the court below with directions to appoint commissioners as by law provided to locate and mark out the line as by this court determined.

[Filed October 27, 1890.]

ROSENTHAL BROS., RESPONDENTS, v. KAHN BROS.,
APPELLANTS.

SALE—WHEN TITLE PASSES.—Ordinarily where there is a sale of goods by number, weight or measure, at so much a piece, a pound, a cord or bushel, it is necessary, in the absence of evidence showing a different intention, that the things should be counted, weighed or measured before the price to be paid can be ascertained. Before this is done, the sale is not so consummate and perfect as absolutely to change the property, but the goods still remain at the risk of the vendor.

CASE IN JUDGMENT.—Where R. agreed in writing to furnish K. 2,900 cords, more or less, of good, sound merchantable fir wood at the rate of \$1.90 per cord, on board the cars at or between Clarnie or Fairview, said wood to be measured and received by the quartermaster at Walla Walla, W. T.; held, that the title to the wood did not pass to K. until received and measured by the quartermaster at Walla Walla.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

On April 30, 1888, the parties to this action entered into the following contract in writing:

“PORTLAND, Oregon, April 30, 1888.

‘Know all men by these presents: That Messrs. Rosenthal Bros., parties of the first part, and J. Kahn, of Portland, Oregon, party of the second part, agree to furnish the said parties of the second part twenty-nine hundred (2,900) cords of good, sound, merchantable fir wood, more or less, said wood to be four (4) feet in length, and each cord to contain one hundred and twenty-eight (128) cubic feet, at the rate of one and ninety-one hundredths dollars (\$1.90) per cord on board cars at or between Clarnie and Fairview; said wood to be received and measured by the quartermaster, United States Army, at Walla Walla, W. T.; and the said party of the second part agreed to advance the said party of the first part one and twenty-five one-hundredths dollars (\$1.25) per cord for all wood delivered at any side of side-track on or before July 1,

19	571
19	580
22	580
24*	989
24*	331
30*	496

19	571
32	319

19	571
43	570

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1888, and the balance to be paid for when measured and received by the quartermaster at Walla Walla, W. T.; all wood to be at the risk of the said party of the first part until delivered to Oregon Railway & Navigation Company on board cars.

“ROSENTHAL BROS.

“JACOB KAHN.

“Witness:

“EDWARD P. PARKE,

“H. N. PATTED.”

This action is brought to recover the contract price for wood delivered under this contract; plaintiffs claiming and alleging that they delivered to defendants, as provided in said contract, 1,392½ cords of wood for which they have received \$1,720, and no more,—leaving a balance due them of \$924.80, for which they ask judgment.

The defendants claim that plaintiffs only delivered to them 1,114 cords, and no more, and that the balance is the sum of \$396.66, which is more than offset by matters alleged in the answer by way of counter-claim.

A trial was had in the court below which resulted in a verdict and judgment in favor of plaintiffs for the sum of \$854.30, from which this appeal is taken.

Dolph, Bellinger, Mallory & Simon, for Appellants.

C. J. McDougall, for Respondent.

BEAN, J., delivered the opinion of the court.

The question presented on the record in this case for our consideration is whether, upon the delivery of the wood on board the cars at the place designated in the contract, the sale became absolute and the title vested in the defendants, or was the sale conditional until the wood was received and measured by the quartermaster at Walla Walla. Upon this question the court below instructed the jury as follows: “Under the contract set out in the pleadings in this case, it was not the business of plaintiffs to procure any shipping receipt or other paper from the railroad company for the purpose of showing the amount of wood which they had

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placed upon the cars when loaded; it was defendant's business to see that shipping receipts were properly made out if they wanted them made out at all; that was something with which the plaintiffs had nothing to do. When they put the wood on the cars they had nothing more to do with it. It was then delivered to the defendants. Under this contract the wood was at the risk of defendants from the time it was put on the cars, so far as concerns any loss which might result from railroad accident, fire or theft, and after it was placed upon the cars their liability ended; they had nothing more to do with it or responsibility for it." The giving of each of these instructions is assigned as error. The contention of plaintiffs is, that as soon as they delivered the wood on board the cars of the Oregon Railway & Navigation Company their duty was done, and they were under no obligation to do anything further under the contract, and the property in the wood immediately vested in the defendants; the act of measuring the wood by the quartermaster at Walla Walla being only the means of ascertaining the quantity in order that the amount defendants were to pay could be computed or determined, and was in no way essential to a change in the title.

The defendants, on the other hand, claim that the receipt and measurement of the wood by the quartermaster was a prerequisite to the consummation of the sale, and until it was done the title did not pass to them. It may be stated as a general rule that when some act remains to be done in relation to the property which is the subject of the sale, and there is no evidence to show any intention of the parties to make an absolute and complete sale, the performance of such act is prerequisite to a consummation of the contract, and until it is performed the title to the property does not pass to the vendee; as, when there is a sale of goods by number, weight or measure, at so much a piece, a pound, a cord or bushel, it is necessary, in the absence of evidence showing a different intention, that the things should be counted, measured or weighed before the price or consideration to be paid can be ascertained. Before

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this is done the sale is not so consummate and perfect as absolutely to change the property, but the goods still remain at the risk of the vendor. *Riddle v. Varum*, 20 Pick. 280; *Wilkinson v. Holiday*, 33 Mich. 386; Benjamin on Sales, § 319; Baker on Sales, § 299; *Fuller v. Bean*, 34 N. H. 290; *Stone v. Peacock*, 35 Me. 388; *Graff v. Fitch*, 58 Ill. 373;¹ *Gibbs v. Benjamin*, 45 Vt. 124. Blackburn in his work on sales states the rule as follows: "When anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, when the price is to depend on the quantity of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted." Blackburn on Sales, p. 151. To this Mr. Benjamin adds another as follows: "When the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property in dispute depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Benj. on Sales, § 320. "The principle is well settled," said Redfield, J., in the case of *Gibbs v. Benjamin*, *supra*, "and uniform in all the cases, that when anything remains to be done by either or both of the parties precedent to the delivery, the title does not pass. And so inflexible is the rule, that when the property has been delivered, if anything remains to be done by the terms of the contract, before the sale is complete the property still remains in the vendor. The contract must be executed to effect a complete sale and nothing further to be done to ascertain the quantity, quality or value of the property." Where no question arises under the statute of frauds, or the rights of creditors do not intervene, the question whether a sale is complete or only executory must usually be determined on the intention of the parties, to be ascertained from the contract, the subject matter and the surrounding circumstances. The

(1) 11 Am. Rep. 85.

parties may settle the matter by the express words of the contract, but if they fail to do so, we must determine, under the rules of law, what their intention was, and when this is ascertained it must govern and control. If the goods sold are sufficiently designated so that no question can arise as to the thing intended, it has been held not absolutely necessary that the goods should be in a deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined; all these circumstances having an important bearing in arriving at the intention of the parties, but no one of them or all combined are conclusive. *Lingham v. Eggleston*, 27 Mich. 324; *Hatch v. Standard Oil Co.*, 100 U. S. 131; *Callaghan v. Myers*, 89 Ill. 566; Benj. on Sales, 239.

It is not disputed that when there has been a complete delivery of the property *in accordance with the terms of the contract of sale*, and nothing remains to be done by either of the parties in relation to the property to effect the transfer, the title passes, although there remains something to be done in order to ascertain the total value of the goods at the value specified in the contract. *Burrows v. Whitaker*, 71 N. Y. 291; 27 Am. Rep. 42; *Graff v. Fitch*, 58 Ill. 373; 11 Am. Rep. 85. There is also a line of authorities which hold that although a large and unknown quantity of goods may be sold by the foot, pound, or yard, yet if the vendor is not bound to weigh or measure before delivery, but delivers the whole to the buyer, the mere fact that the precise quantity is not then known, and so the whole price ascertained, does not prevent the title from passing. These cases, however, proceed largely upon the ground that the particular contract did not require that the articles should be weighed or counted before the title should pass. It is simply a question of the intention of the parties. *Riddle v. Varnum*, 20 Pick. 280; Benj. on Sales, 267. But when the goods are to be weighed or measured in order to ascertain the quality, or quantity, unless it appears that the intention of the parties was otherwise, the title will not ordinarily pass until such measuring or weighing is done. It is not important who

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is to do the weighing or measuring, whether the vendor or buyer or some third party, except as that fact may indicate the intention of the parties as to the time the title shall pass. Thus in *Ward v. Shaw*, 7 Wend. Rep. 404, W. sold to C. a pair of cattle which C. was to take into his possession, slaughter them, take the quarters to market, weigh them and pay \$7.50 for each 100 weight. Immediately after C. took possession, his creditors attached the cattle as his, but the title was held not to pass before the slaughtering and weighing, things to be done by the vendee. Applying these rules to the contract in suit, we are clearly of the opinion that the title to the wood did not pass to the defendants until it was received and measured by the quartermaster at Walla Walla. This agreement being in writing must be held to contain all the terms of the contract, and the court must so interpret it as to carry out the intention of the parties as nearly as such intention can be determined in the light of the contract, the subject matter and the surrounding circumstances. The pleadings admit that the wood was contracted for by defendants to be applied in fulfilling a contract which they had for supplying wood at the barracks at Walla Walla for the use of the United States, and that the plaintiff knew that such was the purpose for which defendants desired the wood at the time they entered into the contract, which explains the provisions of the contract providing that the wood should be received and measured by the quartermaster at Walla Walla, he, no doubt, being the person whose duty it was to receive and measure the wood the defendants were to deliver under their contract with the government.

Under this contract plaintiffs agreed to furnish the defendants 2,900 cords of good, sound, merchantable fir wood, more or less, at the rate of \$1.90 per cord on board the cars at or between Clarnie and Fairview, to be received and measured by the quartermaster at Walla Walla. Here the price is stipulated in the contract for each cord, but quantity, more or less, agreed to be furnished as provided in the contract is to be ascertained by the quartermaster.

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He, by this contract, is the person agreed upon by the parties to measure and ascertain the quantity of wood. As already shown, a contract is not executed and a complete sale effected while anything remains to be done to ascertain the quantity of the thing sold when the sale is by weight or measurement, unless a different intention is clearly shown. The number of cords of wood stipulated to be furnished in the contract is to be ascertained and determined by the measurement, so that after the wood was put aboard of the cars something yet remained to be done to complete the conditions of the sale: some subsequent acts were to be done by the quartermaster, acting by force of this contract, in order to ascertain the quantity of wood sold and the amounts defendants were liable to pay therefor. The defendants made no purchase of the wood as it was from time to time delivered aboard the cars, nor were they bound to take all the wood so delivered, but only such as fulfilled the terms of the contract. The wood was yet to be measured in order to ascertain this fact, and until so measured the title did not vest in them. So inflexible is this principle that unless it distinctly appears that it was the intention of the parties to treat the sale as complete before the ascertainment of the quantity, this is regarded as a condition precedent to the passing of the title.

Several cases were cited by respondents' counsel to the effect that where there is a valid contract of sale, a delivery to a common carrier according to the terms of the contract, vests the title to the property in the buyer. These were cases when goods had been purchased to be shipped by a common carrier, and nothing remained to be done by either of the parties in relation to the goods to effect a transfer of the title, and are not applicable to the case under consideration.

It follows, therefore, that the judgment below must be reversed and the case remanded for a new trial.

Statement of facts.

[Filed November 17, 1890.]

**S. M. BARR, PLAINTIFF AND RESPONDENT, v. BORTHWICK
& FRAME, DEFENDANTS AND APPELLANTS.**

SALE OF PERSONAL PROPERTY—TITLE PASSED.—In the sale of personal property where there has been a complete delivery of the property in accordance with the terms of sale, and nothing remains to be done in relation to the property to effect the transfer, the title passes, although there remains something to be done in order to ascertain the total quantity or value of the goods at the price specified in the contract.

EVIDENCE—COMPETENCY—QUALITY OF GOODS.—In an action for wood sold, where the defense is that wood was not of the quality specified in the contract, evidence is inadmissible by the plaintiff to show the merchantable quality of wood of the same grade, cut from the same place, and on hand a day or two before the trial and some considerable time after the delivery of the wood sued for.

APPEAL from Multnomah county: E. D. SHATTUCK, judge.

This action is founded upon the following agreement in writing: "This agreement, made at Portland, Oregon, this twenty-first day of June, 1889, between Borthwick & Frame, parties of the first part, and S. M. Barr, party of the second part—witnesseth: Said party of the first part are to furnish cars sufficient to carry 1,500 cords of wood; said cars to be placed on what is known as Barr's spur on the Oregon Railway & Navigation Company's railroad, and the said parties of the first part are to pay the party of the second part the sum of two dollars (\$2) per cord for the said 1,500 cords of wood. Said party of the second part is to place on board said cars when furnished 1,500 cords of good, merchantable fir wood. Said parties of the second part are to accept the measurement as given by the government at Walla Walla.

(Signed)

"BORTHWICK & FRAME.

"S. M. BARR.

"Witness:

"J. M. LEAVENS."

The complaint avers that plaintiff did sell and deliver to defendant on board the cars at place designated in contract 1,500 cords of good, merchantable wood, in all respects as agreed; that defendants have paid one thousand dollars on account thereof, and no more, and demand judgment for two thousand dollars, the balance claimed to be due.

Statement of facts.

The answer denies the delivery of any greater number of cords of wood than 1,054 cords. It alleges that it was understood between the parties to the agreement at the time it was made, and when the wood was sold and purchased, that defendants were purchasing it to fill a contract they had with the United States quartermaster for use at Walla Walla; that it was a provision of said contract between plaintiff and defendants, and was therein expressly stipulated and agreed that plaintiff should accept the measurement of said wood made by the government officer on its delivery to the government at Walla Walla; that plaintiff furnished 1,325 cords of fir wood to apply on the contract, but that 271 cords of it were unmerchantable and not good wood and were rejected and refused for that reason by the government agent at Walla Walla, where and when the wood was measured and inspected; that by a subsequent contract it was agreed that defendants should pay to the plaintiffs on said contract \$1,000 when 1,000 cords of good, merchantable wood had been furnished thereunder, and that the remainder of the purchase price of said 1,500 cords of wood should be due and payable when said contract was completed, and said 1,500 cords of good, merchantable wood had been delivered at Walla Walla and paid for and accepted by the government and not otherwise; that said contract has not been completed or filled by plaintiff and he has only delivered under said contract 1,054 cords of wood; that the government has not paid defendants for said wood already delivered, and will not until said contract for 1,500 cords of wood is completed. They deny that \$2,000 or any other sum is due or owing from them to plaintiff.

The reply denies specifically each allegation of the answer, and the only allegation of new matter it contains is that it was by the fault of the defendants that said wood was not measured by the government at Walla Walla or elsewhere. A trial was had before a jury and a verdict and judgment in favor of respondent was rendered for the amount demanded in the complaint, from which this

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appeal is taken. The facts sufficiently appear in the opinion.

Watson, Hume & Watson and R. G. Morrow, for Appellants.

R. & E. B. Williams and C. H. Carey and C. J. McDougall, for Respondents.

BEAN, J., delivered the opinion of the court.

The first question for our consideration is whether the court below erred in instructing the jury, that under the contract in this case the wood of the quality specified in the contract when put on board the cars for the defendants at Barr's spur was thereafter at the risk of defendants, and that plaintiff thereafter had no further liability or responsibility in respect to the wood. The contention of defendants is that the measurement of the wood by the government at Walla Walla is made by the contract a condition precedent to the transfer of the property. This contract being in writing, must be construed by the court, and the intention of the parties as gathered therefrom must control; the general rule of law being that when the goods are to be weighed or measured in order to ascertain the quantity, unless it appears that the intention of the parties was otherwise, the title does not pass until such measuring is done. *Rosenthal v. Kahn*, 19 Or. 571. But where there has been a complete delivery of the property in accordance with the terms of the contract of sale, and nothing remains to be done in relation to the property to effect the transfer, the title passes although there remains something to be done in order to ascertain the total quantity or value of the goods at the price specified in the contract. *Burrows v. Whitaker*, 71 N. Y. 291; 27 Am. Rep. 42; *Graff v. Fitch*, 58 Ill. 373; 11 Am. Rep. 85; *Hatch v. Standard Oil Co.*, 100 U. S. 124.

The delivery of the property is an important factor in determining the intent of the parties, and is usually indicative of an intent that the title should pass, though not conclusive. If goods be completely delivered to the purchaser it is usually very strong evidence of an intent that the property should pass to him and be at his risk,

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notwithstanding that weighing or measuring is to be done afterwards. The inference to be derived from a delivery to the purchaser may, of course, be overcome by the terms of the contract, but in the absence of any provision indicating a different intention, it is usually considered that the title vests upon the delivery. The provisions of the contract in this case are that defendants should provide the cars for the wood purchased by them of plaintiff and should furnish their cars at a certain designated place on the Oregon Railway & Navigation Company's road. The only engagement of plaintiff was to load in these cars, when furnished, fifteen hundred cords of wood, the quality called for in the contract. When he did this his contract completed and nothing remained to be done by either of the parties to effect the transfer. The possession of the wood passed from plaintiff to defendants as soon as put aboard the cars, and there is nothing in the contract which would prevent the title vesting in them as completely as if plaintiff had delivered the wood in defendant's wood yard or loaded it in wagons furnished by them. The possession and control of the wood was immediately transferred from plaintiff to defendants, and upon what principle of either reason or authority it can be claimed that plaintiff had any further liability or responsibility in regard to the wood we are at a loss to understand.

The provision in the contract that plaintiff should accept the measurement as given by the government at Walla Walla simply bound him to abide by that measurement, if made, and cannot be construed into a condition precedent to the passing of the title. The contract does not provide for the receipt or acceptance of the wood by the government at Walla Walla, or that the government should have anything at all to do with the wood except to measure it, if it reached Walla Walla. The only effect of the provision is, that if the wood should be transported to Walla Walla by the defendants, and there measured by the government, and such measurement did not agree with that made by the plaintiff, he will be bound by the quan-

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tity as ascertained at Walla Walla. The duty of causing this wood to be taken to Walla Walla to be measured is for defendants, and before they can bind plaintiff by such measurement, they must show that they have performed this duty. Appellant's counsel claimed in the argument that this case is within the rule announced in the case of *Rosenthal v. Kahn*, decided this term. The contracts in the two cases are materially different. In the *Rosenthal* case, the contract provided that Rosenthal should furnish Kahn 2,900 cords, more or less, of good, merchantable fir wood, at \$1.90 per cord on board the cars at a certain station on the Oregon Railway & Navigation Company's road, said wood *to be received and measured by the quartermaster at Walla Walla*. There the amount of wood, more or less, delivered, was according to the terms of the contract, to be determined by the person whom the parties had agreed upon for that purpose, and until the quantity was to determined the contract was not complete. After the wood was put on board the cars, there yet remained something to be done, according to the very terms of the contract, to complete the sale, namely, *the receipt and measurement of the wood by the quartermaster at Walla Walla*; while here the contract fixed the amount of wood to be furnished, and provided that defendants should furnish the cars and plaintiff should load the wood on board thereof when so furnished. When the cars were furnished by the defendants at the place designated they became their vehicles for the transportation of the wood, and a delivery of the wood on the cars was a delivery to them.

In the *Rosenthal* case there was no agreement that Kahn should furnish the cars, or that the wood should be loaded in cars over which he had any control, but it was to be put in the cars of a common carrier to be transported to the place agreed upon by the parties for the receipt and measurement, and therefore the loading of the cars was not a delivery to Kahn, and under the contract could not be so considered. It appears from the contract that Kahn was fulfilling a contract he had with the government at

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Walla Walla through Rosenthal, and consequently the parties, for reasons satisfactory to themselves, made the quartermaster's receipt and measurement a condition precedent to a right to the price of the wood, and while that could be withheld the sale could not be executed.

On the trial before the jury, the defendants gave evidence tending to show that a portion of the wood delivered to them by plaintiff was not merchantable. To rebut this, plaintiff gave evidence that on the Saturday before the trial, plaintiff, in company with one Rosenthal, examined a lot of wood, perhaps four or five hundred cords, piled along Barr's spur, which plaintiff testified was the same kind of wood and cut from the same place out of which the wood furnished the defendants was taken, and was of a like quality therewith, and that it was cut about the same time.

Rosenthal being called as a witness, was permitted, against defendants' objection, to testify as to the quality of the wood examined by him. In this we think there was error. It is elementary that evidence of collateral facts is inadmissible, for the reason that such evidence tends to draw the minds of the jury from the real fact at issue and in dispute, and the opposite party having had no notice of such a course is not prepared to rebut it. *Greenleaf on Evidence*, § 52. The wood examined by Rosenthal was not the same nor any part of the wood delivered to defendants, and if it were competent for plaintiff to introduce evidence tending to show it was the same kind, the defendants might have introduced evidence to contradict it, and thus a new issue would have been presented to the jury, having nothing to do with the issue on trial. *Henkel v. Burke*, 10 Atl. Rep. 249; *Morawetz v. McGovern*, 68 Wis. 312; *Lore v. Frogge*, 19 Mo. App. 368. The defendants did not claim that all the wood delivered to them was not merchantable, but only 270 cords thereof, and we think the evidence should have been confined to the quality of the wood actually delivered. The fact that the wood examined by Rosenthal was cut from the same place or that a part of it was from the same pile as that delivered to defendants,

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would be a very remote circumstance indicating the quality of the wood actually delivered. Plaintiff was furnishing large quantities of wood from the same place to other parties at the rate of from 800 to 1,000 cords per month during the time he was furnishing wood to defendants, and it would be unsafe to say that he could show the quality of the wood delivered to the defendants by showing the quality of four or five hundred cords that remained along the side-track a few days before the trial, and evidently some time after he had ceased furnishing wood under his contract. The other alleged errors assigned in the notice of appeal under the views we have expressed become immaterial on this appeal, and it is not necessary for us to consider them.

The judgment of the court below will be reversed and a new trial ordered.

RULES OF THE COURT

RULES OF THE COURT.

RULE 1. The second day of the October term shall be set apart as the time when persons desiring admission to practice as attorneys in the courts of this State may appear and present their applications; who, having been examined in open court touching their qualifications for admission, and found duly qualified, may be admitted to practice as attorneys and counsellors in the several courts of this State. Application for such admission can only be made in this court.

RULE 2. Applicants for admission as attorneys shall be examined by the Justices of the Supreme Court, or under their direction, and only such shall be admitted as shall appear duly learned in the common law, the law merchant, the principles of equity jurisprudence, the history and the constitutional law of England prior to the Declaration of Independence, the history and constitutional law of the United States, the statute and constitutional law of this State, and the practical administration of the law.

RULE 3. Each applicant for admission to practice must produce the certificate of some attorney in good standing in this court, that such applicant, if a graduate of some literary institution, has read law at least two years; or, if not such graduate, at least three years, and has the requisite learning and ability. There shall also be presented the certificate of two attorneys of like standing, to the effect that the applicant is a man of good moral character. In case, however, the applicant produce a diploma from any regular law school showing that he has graduated at such school, then the certificate of his having read

the time above specified shall be dispensed with. Such applicant shall also file his own affidavit that he is a citizen of the United States and of this State, and has read the books, a list of which shall be included in his affidavit.

RULE 4. Attorneys and counsellors at law and solicitors in chancery that have been admitted to the bar of the Supreme Court or court of last resort of any other State, Territory or district governed by the common law, or of England, her colonies or dependencies where the common law prevails, and that are otherwise qualified, may be admitted to the bar of this court on motion founded upon proper certificates of admission to such courts, accompanied by a certificate signed by the judge of some court of general jurisdiction in the county or political division in which the applicant last resided, prior to his application, that he is of good moral character and standing at the bar, and has practiced law at least one year.

RULE 5. Every transcript on appeal to this court shall be on legal cap paper, not exceeding 12 $\frac{1}{4}$ by 8 $\frac{1}{4}$ inches in size, and written on one side only; shall be chronologically arranged, and prefaced with an index specifying the page of each separate paper, order, or proceeding. Manuscripts and testimony must be paged by numbering the leaves consecutively to the end, on the bottom of the leaf, near the left hand corner. Transcripts must have the name of each paper written on the margin thereof, and each page of the testimony must have written on the left hand margin near the bottom the name of the witness. The testimony must be preceded by an index, in which shall be noted the first page of the testimony of each witness. No case shall be docketed which fails to conform to the foregoing requirements. In case a motion to expunge a paper or papers from any transcript filed with the clerk of this court be granted, upon the grounds that such paper or papers are not properly a part of such transcript, the clerk of this court shall thereupon, or at any time when this court shall especially order it, separate such paper or papers from the transcript. He shall also be entitled to a fee of two dollars for so separating such papers, which

sum shall be allowed as costs against the party filing the same. When the paper so ordered expunged is so connected that it cannot be expunged without mutilating the remaining part of the transcript, the court may require the party in fault, at his own expense, to file a new transcript, omitting the objectionable papers.

The clerk, in taxing and allowing claims for disbursements for making transcripts, shall in all cases compute the number of folios in the judgment roll and disallow all charges or claims for copies of papers that do not constitute a part of such roll as defined by § 269 of the code of civil procedure.

RULE 6. The transcript shall be filed with the clerk of this court on or before the second day of the term next after perfecting the appeal.

RULE 7. When the appeal is perfected and the transcript is not filed as required by rule 6, the same shall be deemed abandoned, and the respondent may, on motion, have the judgment or decree of the court below affirmed, by filing copies of the notice of appeal and proof of service thereof, the undertaking, and the judgment entry.

RULE 8. The causes triable at Salem from each judicial district shall be docketed together and the cases shall be placed on the docket in the following order unless otherwise ordered: (1) Cases from the fourth district; (2) cases from the first district; (3) cases from the second district; (4) cases from the third district; (5) cases from the fifth district. All cases triable at Pendleton shall be placed on the docket and heard in the order directed by the court. Cases transferred from Salem to Pendleton or *vice versa* shall be placed on the docket and heard at such time as the court may direct. The court may in its discretion direct any particular cause or cases to be advanced on the docket or heard at such special time as it may by order fix for that purpose.

RULE 9. Motions to dismiss appeals, to perfect transcripts, or to affirm the judgment in cases where the appeal has been abandoned, shall be filed at least ten days before the case is called for hearing, and notice thereof

be given as prescribed in titles II and III of chapter VI of the civil code; *provided*, that in all cases which come on for hearing before the end of the second week of the term, it shall be sufficient to file such notice on the third day of the term, when such motions shall be taken up on the first motion day thereafter. Notice of motions to extend the time for filing transcripts shall be served at least three days before the first day of the term.

RULE 10. The second Monday of the term, and each Monday thereafter, shall be motion day, at which time, unless otherwise specially ordered, all motions which have been duly served shall be disposed of.

RULE 11. All applications for rehearing shall be by petition in writing, setting forth the grounds thereof, presented and filed within ten days after the judgment, order, or decision is announced, and within the term. No argument will be heard thereon.

RULE 12. Unless upon good cause otherwise ordered, the applicant, at least five days before the argument, shall furnish to the respondent a printed copy of his brief, and within three days thereafter the respondent shall furnish to the appellant a like copy of his brief. At least two days before the calling of the cause for argument, each party shall furnish to the justices and to the reporter each two copies of his brief, and to the clerk one copy, to be filed with the record of the cause. In suits in equity, the briefs shall contain such portions of the evidence as may be deemed material, giving the names of the witnesses, and the number of the question and answer. A failure to furnish briefs as aforesaid shall be deemed a waiver of the right of the party in fault to argue the cause.

RULE 13. The page of the printed brief must be eight and one-half inches in length, five and one-half inches in width, and the outer blank margin of each page to be one and one-fourth inches wide; and the points, or propositions of law, with the authorities cited to sustain them, must be separately stated from the argument. The points and authorities must be first distinctly stated, and the arguments set forth supplementary thereto.

This rule shall take effect and be in force on the first day of the March term, A. D., 1889.

RULE 14. The mode of revision of final decisions of the circuit courts, where the course of proceeding is not specifically pointed out by the civil code, shall be by appeal, as in cases of appeal from judgments at law; and questions of fact shall not be considered upon such appeal, unless made a record in the form of a bill of exceptions.

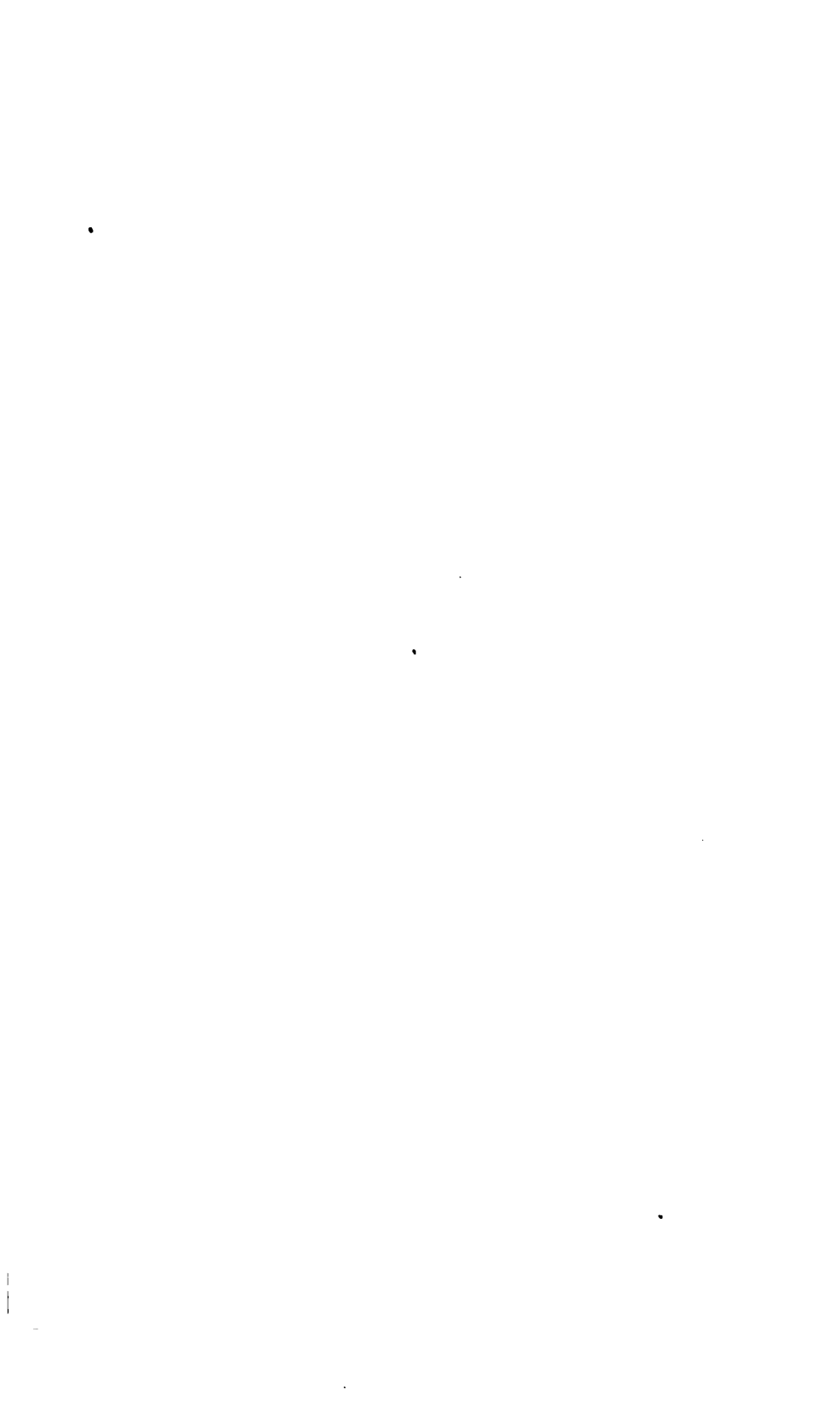
RULE 15. No records or papers on file in the office of the clerk shall be taken therefrom except by order of the court or one of the justices; *provided*, that in cases pending and not yet submitted, the transcript or evidence may be withdrawn temporarily on filing a stipulation to that effect, signed by the attorneys of record in the case, and giving a receipt therefor.

RULE 16. The judgment roll which is to be brought into this court on appeal must be prepared in the manner directed by § 272, pages 343 and 344, annotated laws, and the papers constituting such roll must be annexed together in the chronological order of their filing, issuing and entry, commencing with the complaint, each paper to appear in such judgment roll in the order of time when it was filed or made. Amended pleadings take the place of the originals, and in such case the originals must be omitted from the transcript. No writing or paper whatever must be sent up with the transcript except the evidence in equity cases when it has been taken in writing and is on file in the court below; and all certificates by the clerk must be omitted except such as are required to authenticate the transcript. It is expected that the attorneys for the appellant in all cases will see that these directions are observed in the preparation of the transcript.

I certify the foregoing to be the rules of the Supreme Court of Oregon, and all thereof in force to date.

W. H. HOLMES,
Clerk.

February 28, 1889.



ROLL OF ATTORNEYS.

XIX. Or.—32.



ROLL OF ATTORNEYS.

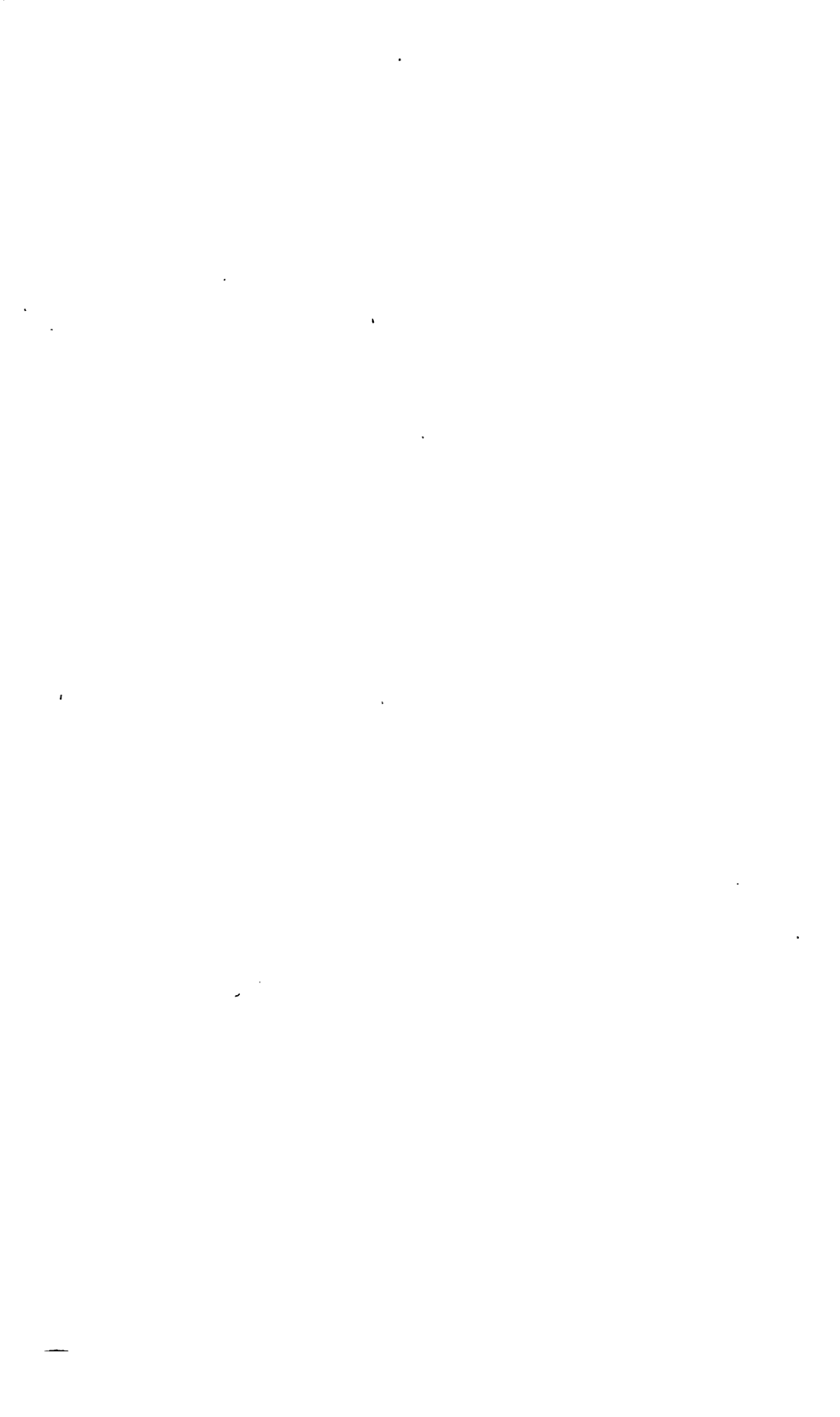
The following attorneys have been admitted since the publication of the sixteenth volume of the Oregon Reports:

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Shamhart, Ivan D.	1	50	1890
Bronaugh, E. C., Jr.	1	66	1890
Fox, Sydney	1	67	1890
Potter, E. O.	1	67	1890
McNary, L. A.	1	67	1890
Smith, John U.	1	68	1890
Moore, F. L.	1	68	1890
Wait, C. N.	1	68	1890
Miller, E. E.	1	69	1890
Wagner, T. P.	1	69	1890
Wright, R. C.	1	69	1890
Bretherton, W. W.	1	70	1890
Kelsey, F. D.	1	70	1890
Rutenic, J. C.	1	70	1890
Johnson, J. J.	1	71	1890
Brattain, Eldon M.	1	71	1890



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ASSIGNMENT FOR BENEFIT OF CREDITORS (Continued).

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1. BILL OF EXCEPTIONS—WHAT IS NOT.—The stenographic notes taken at the trial of a cause, transcribed in full and copied in the record and signed by the trial judge, to which are prefixed a statement calling it a bill of exceptions, and the further statement that the following exceptions will be relied upon by the defendant, followed by a reference to the testimony of sundry witnesses, giving the page; all the cross-examination of a certain witness on a particular subject; all the testimony introduced on the part of the defendant; charge of the court to the jury, giving pages and certain lines.—do not constitute a bill of exceptions, or prevent anything for review on appeal.—*Janeway v. Holston*, 97.
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B BOUNDARY (Continued).

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2. BOUNDARIES—MONUMENTS CONTROL COURSES AND DISTANCES.—The actual location of lines and monuments on the ground will control over courses and distances, and if such monuments can be found the courses and distances must give way. *Lewis v. Lewis*, 4 Or. 178, approved.—*King et al., v. Brigham et al.*, 560.
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C CONTRACTS.

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3. CONTRACT—CONSTRUCTION.—When the town of Pendleton contracted to pump water into a reservoir to the full capacity of its pumps whenever the first parties to the agreement desired to make a test of the reservoir not exceeding once each week for ninety days, such agreement did not impose the duty on said town of doing more than run its pumps to their full capacity during the time they were

CONTRACTS (Continued).

usually and reasonably run. It was not required to incur extraordinary or unusual expense for that purpose or to increase its force of engineers, if the one then employed was capable of running the pumps to their full capacity during the hours he was accustomed to run the same. If the supply of water failed for any cause without the city's fault, so that the reservoir could not be filled at the times required by S. and C., such failure did not put the city in default. If the cistern from which the supply of water was drawn was inadequate, or if, on account of the season, there was a scarcity of water, the city would not be responsible therefor.—*Town of Pendleton v. Saunders et al.*, 9.

4. **RESERVOIR—TESTS OF.**—The "tests" provided for in the agreement were designed for the equal benefit of both parties, and their purpose was to enable both parties to know by actual experiment when the reservoir was completed by being water-tight.—*Town of Pendleton v. Saunders et al.*, 9.
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7. **CONTRACT TO REPAIR MILL AND FURNISH MATERIAL QUANTUM MERUIT.**—When one performs services for another on a special contract, and, for any reason except a voluntary abandonment, fails to fully comply with his contract, and the service and material have been of value to him for whom they were rendered and furnished, he may recover for such material and services their reasonable value, after deducting therefrom any damages the party for whom such materials were furnished and services were rendered has sustained by reason of such failure. *Steeles v. Newton*, 7 Or. 110; *Tribone v. Stroudbridge*, *ibid.*, 156, and *Todd v. Huntington*, 13 Or. 9, approved and followed.—*Gore & Co. v. Island City M. & M. Co.*, 363.
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See **INSURANCE**, 1 and 5.

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RIGHT OF CONTRIBUTION—AFFECTS WHAT PARTIES.—The right of contribution affects only the relation of the co-debtors or sureties between themselves, and is entirely distinct from and independent of the contract with the creditor. The contract is made for the benefit of the creditor and simply expresses the relation between the co-debtors and the creditors.—*Durbin v. Cunev & Sayres*, 71.

1B.—HOW IT ARISES.—The right of contribution does not spring from contract, but rests on general principles of natural justice, that when one has discharged a debt or obligation which was a common charge for the benefit of all, he has a right to call upon his co-debtors for contribution.—*Id.*, 71.

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severally liable, nor whether they are bound by the same or separate instruments, or whether they knew of each other's engagements or not, nor whether they are liable in the same or different amounts, provided their obligation be assumed in respect to one and the same transaction.—*Id.*, 71.

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2. **DISBURSEMENTS—WITNESS FEES ALLOWED.**—When the pleadings present a material fact, the party having the *onus* of proof may subpoena witnesses to support the issue on his part, and if such witnesses are not sworn because the adverse party at the trial admits the fact, thus rendering evidence unnecessary, such party, if he recover cost, may tax the fees of such witnesses as disbursements and recover the same off of the adverse party.—*Pugh v. Good*, 85.
3. **WITNESS NOT SWORN—WHEN CHARGES FOR NOT TAXABLE AS A DISBURSEMENT, AND WHEN TAXABLE.**—If a witness attend upon the trial of a cause and is not sworn, the party causing him to be present cannot recover from the adverse party the expense incurred for such witness unless some sufficient reason exists which would legally excuse his failure to testify. It must be made to appear that his attendance was necessary at the time, but that by reason of some unforeseen event, other sufficient cause, his testimony became unnecessary.—*Id.*, 85.
4. **ISSUES—WITNESSES—COLLATERAL QUESTIONS.**—A party is bound to assume that the only issues triable in a cause are made by the pleadings, and if he subpoena witnesses to testify to matters outside of such issues, he does so at his peril. In cases where collateral inquiries are permissible, a party may bring witnesses to testify in relation to the same, but before he can properly charge as disbursements the expense incurred in procuring the same, he must show that the attendance of such witnesses was necessary. *Jackson v. Siglin*, 10 Or. 83, approved and followed.—*Id.*, 85.
5. **FEES OF OFFICERS—MUST BE AUTHORIZED BY STATUTE.**—An officer can make no charge for any act performed by him by virtue of his office, unless the legislature has, by some statute, authorized such charge.—*Id.*, 85.
6. **SERVICES BY SHERIFF—WHEN CONSTABLE AUTHORIZED TO ACT.**—By the terms of section 2340, Hill's Code, if services be rendered by a sheriff in cases where a constable is authorized to act,—in a justice court, for instance,—he must charge

COSTS AND DISBURSEMENTS (Continued).

the fees allowed by law to a constable for the performance of that particular service, and no more.—*Id.*, 85.

7. **SOME ITEMS FOR WHICH THE STATUTE HAS PROVIDED NO COMPENSATION IN JUSTICE'S COURT.**—The law has not specifically provided compensation in a justice's court for the following services, but the compensation provided covers and includes these items: Making copy of summons; certificate and return; making copy of subpoena; certificate and return on same; making copy of notice of appeal; return on same. Nor is a sheriff allowed, as a separate item, ten cents for making his return on a subpoena in the circuit court.—*Id.*, 85.

COUNTY COURT.

COUNTY COURT—AUTHORITY TO ESTABLISH COUNTY ROAD AND PAY DAMAGES OUT OF THE COUNTY TREASURY—WHEN.—A county court has no jurisdiction to establish a county road unless satisfied that it will be of public utility; that the amount of damages assessed for opening it is just and equitable, and that it will be of sufficient importance to the public to cause the damages so assessed to be paid by the county; in which case it must order the same to be paid to the complainant out of the county treasury.—*Roe v. Union County*, 315.

COUNTY COURT—WHEN IT MAY REQUIRE PETITIONERS FOR PUBLIC HIGHWAY TO PAY THE DAMAGES ASSESSED.—The court may, however, when it is of the opinion that the proposed road is not of sufficient importance to the public to cause the damages to be paid by the county, establish it as a public highway; but it can only do so in that case where the expenses or damages, or such part thereof as it may think proper, are paid by the petitioners. The court may in the latter case, by a supplemental order reciting the facts, establish the road; but this must be done at the term of court at which the preliminary determination is had.—*Id.*, 315.

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CRIMINAL LAW.

1. **SELLING LIQUOR—FORM OF INDICTMENT.**—In an indictment for selling spirituous liquor without a license, under the act of 1839 it is not necessary to allege in the indictment that such sale did not take place within an incorporated town or city.—*State v. Tumler & Polly*, 528.
2. **CRIMINAL LAW—MOTION TO ACQUIT—PRACTICE.**—A motion asking the court to direct an acquittal in a criminal case on account of the failure of proof on the part of the State, unless such failure is a total one, must specify wherein it is claimed such proof fails.—*Id.*, 528.
3. **EMBEZZLEMENT—PROOF OF OTHER ACTS TO SHOW GUILTY INTENT—INSTRUCTION.**—In a prosecution for embezzlement, where evidence is admitted tending to prove other acts of embezzlement from the same parties about the same time as the one charged in the indictment for the sole purpose of showing guilty intent, the court must limit the effect of such evidence to such purpose by instructions to the jury.—*State v. Lewis*, 478.
4. **INDICTMENT—WHEN GUILTY KNOWLEDGE NEED NOT BE ALLEGED.**—In an indictment under section 3352, Hill's Code, guilty knowledge need not be alleged. In declaring the acts mentioned in that section punishable, the legislature was exercising the police powers of the State, and in such case the indictment need not allege that the party knew the act complained of was unlawful.—*State v. Serritt*, 352.
5. **DISEASED SHEEP—MOVING WITHOUT PERMIT—INDICTMENT.**—An indictment under section 3352, Hill's Code, for moving diseased sheep, which fails to follow the descriptive words of the statute, by alleging the ownership of the sheep, is bad on demurrer.—*Id.*, 352.

CRIMINAL LAW (Continued).

6. **INDICTMENT—SALE OF SPIRITUOUS LIQUORS ON SUNDAY—SENTENCE.**—On an indictment which charged an offense under section 1909, Hill's Code, a defendant cannot, on a plea of guilty, be sentenced under section 3, session laws 1889, p. 9.—*State v. Combs*, 285.
7. **SPIRITUOUS LIQUORS—SALE BY AGENT.**—Where one sells spirituous liquors as the agent of another, neither he nor his principal having any license, under the statute he is liable personally to an indictment.—*State v. Chastain*, 178.
8. **STATUTES IN NATURE OF POLICE REGULATIONS.**—Statutes prohibiting the sale of liquors without first having obtained a license therefor, are in the nature of fiscal and police regulations, and make their violation indictable irrespective of guilty knowledge.—*Id.*, 178.
9. **INDICTMENT—WHEN SUFFICIENT UNDER SECTION 1270, HILL'S CODE.**—Under this section when the forms of indictment given in the appendix to the Code are inapplicable, other forms, as nearly similar as the case will permit, may be used.—*State v. Wright et al.*, 258.
10. **BURGLARY—INDICTMENT UNDER SECTION 1760, HILL'S CODE—NAME OF THE OWNER OF THE HOUSE BROKEN NOT GIVEN IN THE INDICTMENT.**—Form No. 13, given in the appendix to the Code, is for the crime of burglary, defined by section 1758, and is sufficient though it does not give the name of the owner of the building. An indictment for burglary under section 1760, otherwise sufficient, which does not give the name of the owner of the building broken and entered, is sufficient under section 1270 of the Code. Such an indictment is as nearly similar to the form given in the appendix to the Code as the nature of the case would permit.—*Id.*, 258.
11. **CRIMINAL LAW—TRIAL—DUTY OF COURT—CHANGE OF VENUE.**—It is the duty of a court of justice empowered to try a party for criminal offense, in all cases to see that the party has a fair trial by an impartial jury; and where the party charged with a criminal offense applies to the court to change the place of trial, upon the ground that the inhabitants of the county where the offense is alleged to have been committed are so prejudiced against him that he cannot expect a fair and impartial trial, and the facts and circumstances of the case show that the party is not liable to obtain an impartial jury in such county, it is the duty of the court to change the place of trial to another county.—*State v. Olds*, 397.
12. **FACTS EXAMINED AND HELD THAT A CHANGE OF VENUE SHOULD HAVE BEEN ALLOWED.**—Where O. was indicted in the circuit court for the county of M. for murder in the first degree, he having killed W. in said county; after two trials O. was convicted of the crime as charged, which conviction having been set aside by the supreme court, the case was again set for trial, whereupon O. applied to the circuit court for a change of venue, upon the grounds that the inhabitants of the county of M. were so prejudiced against him that he could not expect to obtain a fair trial, and showed in his application that the leading newspapers of said county of M. had published full accounts of the former trial, and represented O. as guilty of the offense charged, and one of them contained an article animadverting upon the majority of the members of the appellate court for having set aside the conviction; and it appeared upon the third trial that a jury was only obtained from three hundred names drawn, two of them having been taken after O. had exhausted his peremptory challenges; seven of them stated upon their examination for cause that they had formed and expressed an opinion as to the guilt or innocence of O., and one of them was allowed to sit in the case; *held*, that the court should have ordered a change of the place of trial.—*Id.*, 397.
13. **HOMICIDE—JUSTIFICATION.**—To justify one person in taking the life of another, it must appear that it was done to prevent the commission of a felony by the latter upon the former.—*Id.*, 397.

CRIMINAL LAW (Continued).

14. **HOMICIDE—MURDER IN THE FIRST DEGREE.**—The killing, however, if not justifiable, is not murder in the first degree, unless done purposely and of deliberate and premeditated malice, or in the commission or attempt to commit rape, arson, robbery or burglary; and there must be some other evidence than the mere proof of killing to constitute it murder in the first degree, unless effected in the commission or attempt to commit a felony; and the deliberation and premeditation necessary in such a case must be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood and not hastily upon the occasion. As in the opinion of a majority of the members of the court, there was no proof in the case of the character above mentioned; *held*, that the evidence was not sufficient to warrant a conviction of murder in the first degree; *held, further*, that where the evidence in a case of murder is not sufficient to establish the highest grade of the offense charged, it is the duty of the trial court of its own motion to instruct the jury to that effect; and where it affirmatively appears upon the appeal to this court from a judgment of conviction of murder in the first degree that the evidence was not sufficient to justify it, it is its duty to reverse the judgment.—*Id.*, 397.
15. **CRIMINAL LAW—TRIAL—EVIDENCE.**—The admission of incompetent testimony in a criminal trial prejudicial to the accused, and which is admitted against his objection, is such an error as will require the appellate court to reverse the conviction obtained therein. Where, in a trial for murder in the first degree, charged to have been committed by the accused shooting the deceased at a certain place, the State, in order to show that the accused was waiting at the place immediately before the shooting was done, introduced a witness who testified that as he passed the place he saw a heavy-set man standing there but did not recognize him as the accused, nor was he able to describe the man so that he could be identified as the accused; *held*, that the statement of the witness to a friend of his, a short time thereafter, upon his hearing that the accused had shot deceased, to the effect that he believed that the accused was standing at the place when he passed by, was not competent evidence; *held, further*, that the admission of such statement as evidence under the particular circumstances of the case, against the objection of the accused, was error, and highly prejudicial to him.—*Id.*, 379.

CROSS BILL—WHEN PERMITTED. See PRACTICE, 5.

DAMAGE.

For laying out road. See COUNTY COURT.

See TRESPASS.

See CONTRACT, 2.

DEMURRER. See PRACTICE, 3. See PLEADING, 11.

DEBTOR AND CREDITOR. See ASSIGNMENT FOR BENEFIT OF CREDITORS.

DEED.

1. **DEED—AN EX-SHERIFF HAS NO POWER TO EXECUTE.**—The sheriff in office at the time the certificate is produced and the deed demanded is the proper officer to make the deed, and not the one whose term of office has expired, although he may have made the sale before his office expired.—*Fnull v. Cooks*, 455.
2. **WILL OR DEED—INTENTION TO CONTROL.**—In construing an instrument to determine whether it is a will or deed, the intention is to control as collected from the whole instrument.—*Beede v. McKensie*, 294.
3. **WHEN A DEED AND NOT A WILL.**—Where an instrument conveys a present title to the grantee, and the grantor reserves out of the estate conveyed the right to the use and possession during his life, the instrument is a deed and not a will.—*Id.*, 294.

DEED.—Continued.

4. **SUCH A DEED NOT AN ESTATE TO COMMENCE IN FUTURO.**—Such an instrument does not create an estate in freehold to commence *in futuro*, and is not within the technical rule of the common law applied in such case.—*Id.*, 296.

DEMURRER. See PRACTICE, 3.**DONATION CLAIM.**

1. **DONATION CLAIM—MILITARY POST—WHEN CLAIM NO PART OF.**—The right to take a donation land claim under the act of congress of September 27, 1850, creating the office of surveyor-general of the public lands in Oregon, and to provide for the survey thereof, and to make donation to settlers, did not attach to any tract or parcel of land selected for a military post or within one mile thereof unless the residence and cultivation of the claim was commenced previous to the selection. The settlement of the donation claimant upon the land will not, however, be adjudged to have been in violation of the said act, where it appears that he duly filed a notification of his claim with the surveyor-general, made proof of residence and cultivation in accordance with the provisions of the said act; and that the same were duly received and acted upon by the land department, unless it is shown by competent proof that the selection was duly made prior to the settlement, although the land adjoining the claim was occupied at the time by United States troops as a military post.—*Kelley v. Dallas City*, 299.
2. **DONATION CLAIM—PRESIDENT NOR SECRETARY OF WAR CAN SELECT AS A MILITARY RESERVATION.**—Where a qualified claimant under said act of congress duly made a settlement upon the public domain, and filed a notification with the surveyor-general claiming a parcel of land described therein as a donation claim under the act; *held*, that neither the secretary of war nor the president had authority to select the land as a military reservation without his relinquishment thereof or making him due compensation thereof.—*Id.*, 299.

EJECTMENT.

Equitable defense at law. See PRACTICE, 2.

EMBEZZLEMENT. See CRIMINAL LAW, 3.**EQUITY.**

Outstanding. See ATTACHMENT, 7, 8.

Jurisdiction of. See BOUNDARY, 1.

Jurisdiction of. See LEASE, 1.

See PUBLIC LANDS, 2.

EMINENT DOMAIN. See COUNTY COURT.**ESTATES OF DECEDENTS.**

Claims against—Effect of paying without an order of the court. See EXECUTORS, 2.

ESTOPPEL. See INSURANCE, 10.**EVIDENCE.**

1. **PRESUMPTION—PAROL EVIDENCE—NEGOTIABLE PAPER.**—When a third person indorses a negotiable note, the liability is presumptively that of an indorser, but it may be shown by parol evidence to be the liability of a joint-maker according to the intention of the parties as disclosed by the facts.—*Deering v. Gresham*, et al., 118.

EVIDENCE (Continued).

2. **ACCOMPLICE—CORROBORATIVE EVIDENCE.**—Where the corroborative evidence showed that the defendant and his accomplice were together at or near the place where the larceny of the animal was committed under circumstances which indicated concert between them in furtherance of a common purpose; *held*, that the evidence did tend in some degree to connect the defendant with the commission of the crime.—*State v. Townsend*, 213.
1. **EXPERT TESTIMONY—OPINION OF WITNESSES—WHEN COMPETENT.**—Subdivision 9 of section 706, Hill's Code, makes the opinion of a witness competent evidence respecting the identity or handwriting of a person where he has knowledge of the person or handwriting; and also his opinion on a question of science, art, or trade, when he is skilled therein.—*Pendleton v. Saunders et al.*, 9.
4. **EVIDENCE—TIME CHECKS.**—Time checks given by the contractor to the laborer, though not conclusive against the owner of the structure, are declarations of the defendant's agent in the line of his employment, and are to be considered and weighed for whatever they are worth; and if their effect be not countervailed in some way, may be sufficient proof of such claim.—*Forbes v. Willamette Falls Electric Co.*, 61.
5. **EVIDENCE—PRESUMPTION, WHERE THE RECORD IS SILENT.**—Where there is no direct evidence that a traveler did not stop, look and listen before he entered upon the crossing, the presumption of law is that he did his full duty and observed the precautions which it prescribed.—*McBride v. N. P. R. R. Co.*, 64.
6. **EVIDENCE—HEARSAY.**—In an action against a railroad company to recover damages for personal injuries, it is not competent for the plaintiff to give in evidence the statements and declarations of a stranger in relation to the departure or movements of the defendant's trains. Such evidence is hearsay.—*Haase v. O. R. & N. Co.*, 854.
7. **TO MAKE TITLE UNDER AN EXECUTION SALE, THE JUDGMENT MUST BE PROVEN.**—An execution, regular upon its face, emanating from a court of competent jurisdiction, will protect an officer who obeys it; but when a purchaser claims title under an execution sale, the judgment upon which the execution was issued must be proven.—*Fuall v. Cooke*, 455.
8. **ADVERSE USER OF WATER—EVIDENCE EXAMINED AND HELD INSUFFICIENT.**—The evidence [as] to adverse [user] of the water in controversy examined and held insufficient to prove an adverse user for ten years.—*Id.*, 455.

EVIDENCE.

- Sufficiency of. See **BOUNDARY**, 3.
 Sufficiency of. See **CRIM. LAW**, 12.
 Cross-examination. See **INSURANCE**, 6.
 See **CRIMINAL LAW**, 3, 15.
 See **FRAUD**, 1.
 See **NEGOTIABLE INSTRUMENT**, 2.
 See **SALES**, 4.
 Parol, when not admissible. See **TRUSTS**, 2.

EXCUSABLE NEGLIGENCE.

EXCUSABLE NEGLIGENCE—WHAT NOT.—The neglect of a party or his attorneys, under the facts as presented by this record, to inform himself of the recitals in a deed of conveyance by which he claims title and which he offers in evidence, is not such "excusable neglect" as would warrant the court in the exercise of the discretion conferred on it to open a judgment under section 2, Hill's Ann. Code. To justify the interference in any such case, an abuse of discretion must be shown.—*Hickin v. McClair*, 508.

EXHIBIT. See **PLEADING**, 10.

EXECUTION.

1. **EXECUTION—WHEN TO BE RETURNED.**—By section 278, Hill's Code, an execution is returnable within sixty days after its receipt by the sheriff; and by section 298 the time may be enlarged thirty days by the consent of the plaintiff endorsed upon the writ.—*Faull v. Cooke*, 455.
2. **EXECUTION AFTER TIME TO RETURN HAS EXPIRED IS FUNCTUS OFFICIO.**—When there has been no levy under an execution, and the return day has expired, and the writ is *functus officio*, and confers no authority whatever, and a levy and sale by virtue of it, is a nullity.—*Id.*, 455.

EXEMPTION. See **HOMESTEAD**, 4.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTOR AND ADMINISTRATOR—SEMI-ANNUAL ACCOUNT.**—It is the duty of every executor or administrator, within six months after notice of his appointment, and every six months thereafter until the estate is settled, to file a semi-annual account; and the county court must, at the first term after any such account is filed, ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed within the first six months, or any succeeding six months thereafter, after paying the funeral charges and expenses of administration, and if so it shall order and direct; but if the estate be insufficient for that purpose, it shall ascertain what per centum it is sufficient to satisfy, and direct accordingly.—*Roster v. Morat*, 181.
2. **EFFECT OF PAYING CLAIMS WITHOUT AN ORDER OF THE COURT.**—By paying claims in advance of an order by the court, an executor or administrator takes the risk of securing the approval of his acts by the court when his accounts and vouchers shall be presented.—*Id.*, 181.
3. **DISALLOWANCE OF EXECUTOR OR ADMINISTRATOR'S FINAL ACCOUNT.**—If the final account of an executor or administrator be disapproved by the court, he may either appeal from the decree disallowing the same or file another account which shall meet the objections of the court.—*Id.*, 181.
4. **DECREE FOR MONEY IN PROBATE PROCEEDINGS.**—A decree for the payment of money in probate proceedings cannot be enforced as for a contempt. The proper process is an execution.—*Id.*, 181.
5. See **REAL PROPERTY**, 1, 2, 3.
6. See page 503; no syllabus.

EXPERT. See **EVIDENCE**, 3. See **WITNESS**.

FACTOR.

1. **FACTOR—NO AUTHORITY TO PLEDGE GOODS CONSIGNED ONLY TO AMOUNT OF ADVANCES.**—A factor or commission merchant, who receives goods to be sold upon commission, has no authority to pledge them; but where he has advanced money upon the goods, he thereby acquires a lien upon and special property in them to the amount of such advances, which he may pledge for his own use.—*Merchant's Bank v. Pope*, 36.
2. **FACTOR—DRAFT AGAINST CONSIGNMENTS—INTEREST.**—Where certain commission merchants received from time to time amounts of fish oil from a company engaged in the Alaska trade, upon the understanding and promise to make sale of it for the account of the company, and to render the proceeds thereof, less their charges for services in that behalf, and it was agreed between the merchants and the company that an account current of interest charges should be kept and paid at the rate of 10 per cent per annum, and the merchants, after receiving and shipping portions of the oil to a consignee in a foreign market for sale, upon which they had made advances to the company on account thereof, drew in their own name and for their own use against the consignments, and negotiated the drafts upon

FACTOR (Continued).

their own credit, but attached thereto the bills of lading as collateral security for the payment thereof; *Add*, that interest upon the money received by the merchants in the negotiations of the drafts did not constitute a proper debit against them in their account with the company.—*Id.*, 36.

FINDING OF LAW BY APPELLATE COURT.

FINDING—WHEN DISREGARDED.—When a finding is wholly unsupported by evidence and that fact is made to appear by a bill of exceptions purporting to contain all the evidence upon this point, this court would disregard it.—*Fenstermacher et al. v. State*, 504.

FRAUD.

FRAUD—PROOF OF.—Fraud is a matter of fact which must be proven; it is never presumed. It may be established by circumstances; but the circumstances relied upon must be of such a satisfactory character as to convince the mind of the trier of the fact that the transaction was a sham and not what it purports to be.—*Keef v. Levy*, 450.

FENCE. See **RAILROADS**, 5, 7, 8, 10, 11 and 12.

FINDINGS OF FACT. See **VERDICT**.

FEE.

Of attorney. See **ATTORNEY**, 1.

Of officer. See **COSTS AND DISBURSEMENTS**, 5, 6, 7.

Of witness. See **COSTS AND DISBURSEMENTS**, 2, 3, 4.

FAMILY EXPENSES.

When wife not liable for. See **MARRIED WOMAN**, 2.

FRAUD. See **PUBLIC LANDS**, 3. See **PLEADING**, 12.

FRAUDULENT CONVEYANCE. See **TRUSTS**, 6, 7, 8. See **MORTGAGE**, 4.

HIGHWAYS. See **COUNTY COURT**.

HOMESTEAD.

1. **HOMESTEAD SETTLER—PUBLIC LANDS OF THE UNITED STATES.**—When a homestead claimant settles upon the public lands of the United States, and in due time files upon said homestead claim as required by the act of congress granting homesteads to actual settlers upon the public lands of the United States, said homestead claim thus becomes separated from the public domain and ceases to be public lands of the United States, and thereafter a railroad company, by complying with the act of March 3, 1875, does not acquire a right of way through the homestead claim of such settler; *held, further*, that the act of congress of March 3, 1875, does not purport to grant a right of way through the claim of those who had prior to the time such right attached acquired possessory rights in such public lands, and that by the third section of the act such rights are only to be taken by condemnation.—*Larsen v. O. R. & N. Co.*, 240.
2. **PUBLIC LANDS OF THE UNITED STATES—HOMESTEAD CLAIMANT—TITLE BY RELATION.**—By the act of congress of March 14, 1880 (21 stat. 141), any settler who had or should thereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, was allowed the same time to file his homestead application and perfect his original entry in the United States land-office as was allowed to settlers under the preemption laws to put their claims on record, and his right relates back to the date of settlement, the same as if he settled under the preemption laws.—*Fuall v. Cooke*, 455.

HOMESTEAD (Continued).

3. **HOMESTEAD CLAIMANT'S RIPARIAN RIGHTS.**—A homestead claimant's riparian rights attach from the date of his settlement provided he complies with the law and obtains a patent for the land; and when such patent is issued it relates to the date of settlement and cuts off the right to divert a stream of water running through such homestead.—*Id.*, 455.
4. **HOMESTEAD—EXEMPT FROM FORCED SALE FOR DEBT CONTRACTED BEFORE THE ISSUANCE OF A PATENT.**—Under the act of congress granting homesteads to actual settlers on the public lands of the United States, a homestead is not liable to be sold by virtue of an execution issued upon a judgment rendered for a debt contracted before a patent is issued for such homestead.—*Clark v. Bayley*, 5 Or. 243, followed.—*Id.*, 455.

HOMICIDE. See **CRIMINAL LAW**, 13 and 14.

IMPROVEMENTS.

Compensation for. See **VENDOR and VENDER**,
Of street. See **MUNICIPAL CORPORATION**, 2 and 3.

INSTRUCTIONS TO JURY.

1. **INSTRUCTIONS—ABSTRACT PROPOSITIONS OF LAW.**—An instruction to the jury based on no evidence in the case is abstract and may be misleading.—*Bailey v. Davis*, 107.
2. **INSTRUCTIONS—PROVINCE OF THE COURT AND JURY.**—When an instruction otherwise proper was asked by the defendant, but said instruction in effect submitted to the jury to find from the pleadings what was and what was not specially pleaded, its refusal was not error. It is the province of the court to declare what are the issues to be tried and to construe the pleadings, and of the jury to find the facts. The instruction refused submitted matters of law to the jury the decision of which properly belonged to the court.—*Larsen v. O. R. & N. Co.*, 240.
3. **INSTRUCTION—REFUSED—ERROR.**—When there was no allegation of special damages the refusal of the court to give this instruction was held erroneous: "The plaintiff having neither pleaded nor proved any special damages resulting from the alleged frightening of his horses, he can recover nothing from that cause."—*Larsen v. O. R. & N. Co.*, 240.

See **CRIMINAL LAW**, 3. See **INSURANCE**, 7.

INDORSER. See **NEGOTIABLE INSTRUMENT**.

INJUNCTION. See **PUBLIC LANDS**, 3.

INDICTMENT. See **CRIMINAL LAW**, 1, 4, 5, 6, 9, 10.

INSURANCE.

1. **CONTRACT OF INSURANCE—PRINCIPAL AND AGENT.**—Contracts of insurance must have effect like all other written contracts. The intention of the parties must govern and control, and when the language used is plain and unambiguous, the intention of the parties to the contract must be gathered from the language used therein. In such case the office of the court is to ascertain the language used and then enforce it according to its legal effect; and when an agent's authority is limited and the party with whom he contracts has notice of such limitation or want of authority in the agent, under no circumstances can the principal be bound beyond the agent's authority.—*Weidert v. State Ins. Co.*, 231.
2. **POLICY OF INSURANCE—PRINCIPAL AND AGENT.**—When a policy contained an express limitation on the power of agents, an agent has no legal right to contract as against the company with a party having actual knowledge of such want of authority so as to change the terms of the contract, or to dispense with the performance of any part of the consideration, either by parol or in writing; and a party by accepting a policy containing such limitation upon the powers of the agent, is estopped from setting up powers in the agent, at the time, in opposition to the conditions and limitations in the policy.—*Id.*, 231.

INSURANCE (Continued).

3. **PRINCIPAL AND AGENT—EXTENT OF AGENT'S POWERS.**—Agents of underwriters at a distance from their principals are either general or special agents possessing plenary or limited powers depending on the terms of the grant of power, or powers, exercised with the assent of the principals; and the extent of their power is to be determined by the same rules that control in respect to other agencies.—*Id.*, 261.
4. **CONTRACT OF INSURANCE—SPECIAL AGENTS.**—In case of a special agent the assured must, at his peril, know whether the act relied on is within the scope of the agent's real or apparent authority.—*Id.*, 261.
5. **WRITTEN CONTRACTS—CONTEMPORANEOUS AGREEMENTS MERGED.**—When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms; all antecedent and contemporaneous oral agreements are merged in the writing. In such case the writing is the sole evidence of the agreement, unless a mistake or imperfection in the writing is put in issue by the pleadings, or when the validity of the agreement is the fact in dispute.—*Id.*, 261.
6. **EVIDENCE—CROSS-EXAMINATION.**—When it appeared that a party had two furnished houses in the same vicinity, and there was a question which was his residence, it was not error in the trial court to exclude evidence on his cross-examination tending to show at which place he had the most furniture. Such fact was too remote to give any aid in determining the question.—*Id.*, 261.
7. **PLEADING—INSTRUCTION ON A MATERIAL FACT NOT IN ISSUE SUGGESTED BUT NOT DECIDED.**—In an action on a policy of insurance, when the plaintiff alleges that he duly performed all the conditions of said contract on his part, and upon the trial seeks to prove that the defendant waived the performance of certain conditions of the policy, and relies solely upon such waiver; *quære*, whether or not it is competent for the court to instruct the jury on a material issue outside of the pleadings, suggested but not decided, because the question was not made at the trial.—*Id.*, 261.
8. **POLICY OF INSURANCE—CONDITIONS—PROOF OF LOSS.**—When a policy of insurance required the assured to make certain specific proofs in case of loss, such requirements are conditions to be complied with by the assured before he has any legal claim against the company for loss, and in such case all the conditions must be substantially, if not strictly, complied with or no recovery can be had.—*Id.*, 261.
9. **WAIVER—FACTS EXAMINED AND HELD INSUFFICIENT.**—The facts examined and held that the condition of the policy as to proof of loss was not waived, and that there was not sufficient evidence to carry that question to the jury.—*Id.*, 261.
10. **WAIVER—ESTOPPEL.**—A waiver that would preclude the defendant from relying on the terms of the policy must be in the nature of an estoppel. The company must, by some act of an agent having real or apparent authority, have done or said something that induced the plaintiff to do or forbear to do something whereby he was prejudiced.—*Id.*, 261.
11. **POLICY—CONDITIONS—FAILURE OF ASSURED TO MAKE PROOF.**—When a failure to comply with the conditions of a policy is due wholly to the fault of the insured, the general doctrine seems to be that the policy is dead and cannot be revived by anything short of a new consideration or an express waiver on the part of the insurer. If no proofs are served in time, and the insurer has done nothing to induce the omission, the insured has lost all rights under the policy, and the insurer is not bound to specify its defenses, nor does it waive those not specified.—*Id.*, 261.
12. **POLICY—TERMS OF AS TO WAIVER.**—Where a policy contained an enumeration of particulars that should not constitute a waiver of its terms or conditions in an action thereon, it may rely upon the terms of the policy unless precluded by fraud or by such facts as would constitute an estoppel.—*Id.*, 261.
13. **NON-SUIT—OCCUPANCY OF THE DWELLING-HOUSE INSURED.**—On motion for a non-

INSURANCE (Continued).

shit, the facts examined and held that the dwelling-house insured was not occupied at the time of the loss within the meaning of the policy.—*Id.*, 261.

14. **POLICY OF INSURANCE—PROPERTY UNOCCUPIED.**—The application for a policy of insurance provided that, "in case any of said property shall be or become vacant or *unoccupied*, the said policy shall remain suspended and be of no effect in respect to any of these contingencies;" and further provided that if any change shall take place in the occupancy of said premises * * * "without being immediately notified and its consent thereto obtained in writing and endorsed hereon and signed by the president or secretary of this company, this policy shall, in either event, immediately thereafter be null and void"; and, further, that "this company shall not be liable for any loss or damage while the above-mentioned premises shall be vacant or *unoccupied*"; *held*, that while the premises insured were not *occupied* the policy was suspended, and if the loss occurred during said time there was no liability on the policy. For a dwelling-house to be *occupied* within the meaning of this policy it must be used by human beings as their customary place of abode.—*Id.*, 261.

JUDGMENT OF NONSUIT.

See PRACTICE, 141.

PRESUMPTION OF PAYMENT.

See PAYMENT, 1.

THE FINDING OF FACT MUST AUTHORIZE THE JUDGMENT.—*Held, further*, that the circuit court could not properly decide that interest upon said money, so drawn, was chargeable in the account against the said merchants, in the absence of a finding of fact justifying such decision.—*Merchants Bank v. Pope*, 85.

JURY.

1. **FACTS—WHEN FOR THE JURY.**—It is not for the court to speculate upon the facts, but to submit them to the jury, if they tend to support the cause of action.—*Hartig v. N. P. L. Co.*, 522.
2. **JURY—PROXIMATE CAUSE.**—It is ordinarily the province of the jury to ascertain whether the injury is the natural and proximate cause of the wrong complained of.—*Id.*, 522.

See TRIAL.

JUSTICE'S COURT.

Appeal from. See APPEAL, 1.

Filing transcript on appeal from. See APPEAL, 5.

Undertaking on appeal from. See APPEAL, 2.

LIEN.

1. **LIEN FOR LABOR ON STRUCTURE—ELECTRIC WIRE.**—Poles set in the ground connected together by wire in the usual way for the transmission of electricity for the purpose of light and power, constitute a *structure* within the meaning of section 8609, Hill's Code, and a lien attaches for labor performed on such *structure* under employment by the contractor.—*Forbes v. Willamette Falls Electric Co.*, 61.
2. **LIEN—INTEREST.**—On the subject of interest in such case, *The Willamette Falls v. M. Co. v. Eley*, 1 Or. 183, approved and followed.—*Id.*, 61.

Of agister. See MASTER AND SERVANT, 1.

Of mechanic. See MECHANIC'S LIEN.

Of attachment. See ATTACHMENT, 6.

Of judgment. See MORTGAGE, 3.

LEASE.

LEASE—EQUITABLE JURISDICTION—CANCELLATION.—Where the neglect and omissions of the defendants to perform their obligations under a lease resulted in waste, which, if permitted to continue, must eventually result in the ruin and destruction of its subject matter to the irreparable damage to the plaintiff; *held*, that equity would interfere and cancel the lease to prevent such waste and destruction. —*Anderson v. Hammen et al.*, 446.

MASTER AND SERVANT.

1. **MASTER AND SERVANT—AGISTER OF CATTLE.**—When the relation of master and servant exists, the servant can acquire no lien on his master's cattle for depasturing or feeding them, under section 3684, Hill's Code. —*Bailey v. Davis*, 217.
2. **DUTY OF MASTER TO OBSERVE CARE.**—It is the duty of the master to observe due care and not to expose his servants to unreasonable risks; and when the nature of the business requires it, to make needful rules or regulations for its safe conduct so as to protect those in his employment against accidents. —*Hartvig v. N. P. L. Co.*, 522.

MERGER.

MERGER—QUERE.—Whether the holder of a note secured by a chattel mortgage who caused the mortgaged property to be attached on another debt due to him by the mortgagor and sold, and such mortgagee purchases the same at the sale, and there is nothing to show that he intended to keep the mortgage alive as a lien, the mortgage is merged, *quere.* —*Keel v. Levy*, 450.

MARRIED WOMEN.

FAMILY EXPENSES—WIFE WHEN LIABLE.—Where goods are bought as family expenses and are so used, either husband or wife is liable in an action for them, but the wife cannot be made liable on a contract based on account stated between her husband and the plaintiff to which she has not assented. —*Holmes v. Page*, 332.
Time within which to commence an action. See STATUTE OF LIMITATIONS, 2.
See TRUSTS, 6.

MECHANIC'S LIEN.

1. **MECHANIC'S LIEN—NOTICE—NAME OF OWNER.**—A notice of lien sufficiently gives the name of the owner of the land where the building or erection was placed which says: "Said real estate reputed to be owned by one E. R. H. and said building reputed to be owned by one G. M. R." —*Krossel v. Rowe et al.*, 188.
2. **MECHANIC'S LIEN—KNOWLEDGE OF THE OWNER OF LAND—WHEN MUST BE SHOWN.**—In case some person other than the owner of the land employs a material man or laborer to furnish material or to perform labor upon a building or erection upon such other's land, something more is necessary to reach the title of such owner than to insert his name as owner in the notice filed with the county clerk, or to say that he is such owner or reputed owner. It must be made to appear somewhere in the record that such building or improvement was placed on his lands with his knowledge; and then the lien can only be defeated by such owner making it appear that within three days after he obtained knowledge of the construction, alteration or repair of such building or other improvement, he posted notice in writing that he would not be responsible for the same, which notice must be posted in a conspicuous place upon said land, or upon the building or other improvement situated thereon. —*Id.*, 188.

MORTGAGE.

1. **CHATTEL MORTGAGE—FORECLOSURE—SHERIFF.**—Miscellaneous Laws of Oregon, chap. 39, § 2, provides for the foreclosure of chattel mortgages in the manner provided by the mortgage itself, if the mortgage contains any provisions on the subject; otherwise, by the sheriff taking possession and selling. *Held*, that a sheriff cannot justify a possession taken by him under a mortgage providing that in case of default the mortgagee may take possession of the property and sell or otherwise dispose of it upon the ground of acting in his official capacity under directions from the mortgagee. —*Pitcock v. Jordan*, 7.

MORTGAGE (Continued).

2. **SAME—FILING—PRIORITY.**—Under the Oregon statutes, in cases of successive chattel mortgages upon the same property, the one first filed is entitled to priority.—*Id.*, 7.
3. **CHATTEL MORTGAGE—GROWING CROP.**—The lien of a chattel mortgage on a growing crop follows the grain after severance and removal, and the money after sale.—*Keel v Levy*, 450.
4. **CHATTEL MORTGAGE—WHEN VOID AS TO ATTACHING CREDITORS.**—When it appears either on the face of a chattel mortgage or by parol evidence that the mortgagee of personal property has given to the mortgagor power to dispose of the property mortgaged and to apply the proceeds to his own use, the mortgage is void as to attaching creditors.—*Aiken v. Pascall*, 493.
5. **MORTGAGE—JUDGMENT LIEN—ORDER IN WHICH LAND TO BE SOLD AND PROCEEDS APPLIED.**—Where plaintiff had a first lien by mortgage on the lands of S. and S. G., and C. & W. had a lien by judgment on the lands of S. only; *held*, that the lands of S. & G. should be first sold and the proceeds applied on plaintiff's mortgage, and that S.'s land should then be sold and the proceeds applied to pay anything remaining due on plaintiff's mortgage, and the balance, or so much as might be necessary, be applied to the payment of C. & W.'s judgment, and the residue, if any, be deposited in court for whoever may appear to be entitled to same; and so much of said decree as allowed the sheriff to amend his return on the writ of attachment must be reversed.—*Hall v. Stevenson et al.*, 153.

MONUMENTS. See **BOUNDARY**, 2.**MUNICIPAL CORPORATIONS.**

1. **MUNICIPAL CORPORATIONS—SURFACE WATER—WHEN NOT LIABLE FOR CHANGING ITS COURSE.**—A municipal corporation is not liable to an owner of land situated within its corporate limits for not permitting surface water which had been accustomed to flow over the land to be turned down the gutters of one of its streets in order to prevent its flowing in its former course, although the improvement of the street obstructed its flow in the direction in which it naturally ran.—*Bush v. City of Portland*, 45.
2. **IMPROVEMENT OF STREET—WATER TURNED INTO A GUTTER.**—Where the city of P. improved one of its streets running north and south, and thereby turned surface water which had been accustomed to run down a slope on the west side thereof across the same and a certain other piece of land, to where it emptied into a creek, which ran across the land, and the improvement of the street turned the water down the gutter on the west side of the street where the city authorities first designed it to run permanently, but it being subsequently ascertained that the course of the water down the gutter was injuring the street and abutting lots below, the said authorities turned it across the street and by means of a box gutter conveyed it through said land to the said creek near where it formerly ran, and B. thereafter, having purchased the land, diverted its course down the gutter on the east side of the street where it ran until complaint was made by the abutting lot owners on that side of the street, when the city authorities turned it back again into the said box gutter, and the evidence failed to show that the street was not properly improved, or that conveying the water through the box gutter was more injurious to the land than it would have been if allowed to flow in its natural channel course; *held*, that B. was not entitled to recover damages against the city in consequence of the turning of the water from the gutter of the street into the box gutter.—*Id.*, 45.
3. **IMPROVEMENT OF STREET—INJURY OCCASIONED BY.**—A municipal corporation is not liable to an owner of real property for an indirect injury to the property, occasioned by the improvement of its streets, where the injury is a necessary consequence of the improvement, and the work is properly performed.—*Id.*, 45.
4. **MUNICIPAL CORPORATIONS—WRONGFUL ACT OF OFFICER.**—A municipal corpora-

MUNICIPAL CORPORATIONS (Continued).

tion is not generally liable for the wrongful act of an officer, and in the few cases where it may be liable, it must be made to appear that such officer was not an independent public officer, and that the wrong complained of was done by such officer while in the legitimate exercise of some duty of a corporate nature, which was devolved upon him by law or by the direction of the corporation.—*Caspary v. City of Portland*, 496.

5. MUNICIPAL CORPORATION—POWER TO RESTRAIN DRUNKENNESS.—The power is conferred upon the council of the town of Prineville by its charter (Session Acts, 1880, p. 116) to prevent and restrain drunkenness. Under this power the council may prohibit the furnishing or giving intoxicating liquors to an habitual drunkard or one who is in the habit of becoming intoxicated.—*Woods v. Prineville*, 108.
6. PLEADING—TOWN ORDINANCE.—The proceedings in a recorder's court to enforce the ordinances of a town are necessarily summary; but in pleading, the substance of all that is legally necessary must appear, and in declaring on an ordinance it is sufficient to plead its legal effect. It might have been set out in *haec verba*, but this form is not indispensable. In declaring upon a town ordinance, it is generally sufficient if the complaint follow the descriptive words of such ordinance.—*Id.*, 108.
7. VALIDITY OF TOWN ORDINANCE—PROOF.—In enforcing a town ordinance, its passage must be made to appear, and its legality will then be determined by the charter and by what is contained in such ordinance.—*Id.*, 108.

MURDER. See CRIMINAL LAW, 13 and 14.

NAVIGABLE STREAM.

1. NAVIGABLE STREAM—WHAT IS.—A stream, or water-course, in order to be navigable, must be of sufficient extent and capacity to enable the community at large to utilize it in the navigation of boats and other water-craft thereon, for the transportation of products and merchandise; or for the purpose of floating logs and timber from forests to market.—*Nutter v. Gallagher*, 375.
2. CASE IN JUDGMENT.—Where N., desiring to open a way of navigation to a certain point on a navigable tide slough, situated upon the land of G., which joined his premises, cleared away logs and brush from a gulch through which flowed a small mountain stream, deepened the same, and cut a channel therefrom through the intervening land of G. to such point of navigation, thereby opening a water-course between his premises and said point, by means of which he was enabled to float logs and small boats thereon at extreme high tides, which occur but a few days during the year; and it appearing that the communication so established was merely for the use and benefit of N. and those who might succeed him in the ownership of his premises; *held*, that such water-course did not constitute a navigable stream in the sense and meaning of the term as legally understood. *Haines v. Hall*, 17 Or. 166, approved.—*Id.*, 375.

NEGLIGENCE.

1. WHEN OWNER IN POSITION TO PREVENT DAMAGE TO HIS PROPERTY BY FIRE AND NEGLECTS TO DO IT, SUCH NEGLECT WILL BAR HIS RECOVERY.—If the plaintiff was in a position to have prevented any damage from fire to his property without incurring unusual danger, and made no effort to do so, it was negligence on his part and precludes his right of recovery.—*Eaton v. O. R. & N. Co.*, 331.
2. CONTRIBUTORY NEGLIGENCE.—A person who goes in the night-time in the midst of a car yard, and at a place where the railroad company is not accustomed to receive passengers, and without the knowledge of those in charge of a freight train standing there, attempts to enter the caboose attached to such freight train, and is injured, is guilty of contributory negligence and cannot recover for such injury.—*Haase v. O. R. & N. Co.*, 354.
3. WRONGDOER—WHEN LIABLE.—It is well settled that a wrongdoer is liable for an

NEGLIGENCE (Continued).

injury which resulted as the natural and probable consequences of his wrongful act, and which he ought to have foreseen in the light of surrounding circumstances.—*Hartig v. N. P. L. Co.*, 522.

4. **STOCK RUNNING AT LARGE.**—Stock running at large are animals that roam and feed at will, and are such as are not under the immediate direction and control of any one; and in such case if they wander upon the track of a railroad, and are killed, the owner in allowing them to run at large is not guilty of contributory negligence and precluded from a recovery.—*Keney v. O. R. & N. Co.*, 291.
5. **STOCK IN CHARGE OF A HERDER—CONTRIBUTORY NEGLIGENCE.**—Stock in charge of a herder and subject to his control is not stock running at large, as the places whither they wander and feed, or lie down to rest, are selected by him and subject to his direction and control; and if he voluntarily drives and leaves them uncared for in a place of danger along a railroad track where injury is likely to happen to them as a probable consequence, and they are killed, his act will be regarded as the proximate cause of the injury and preclude the owner from recovery.—*Id.*, 291.

NEGOTIABLE INSTRUMENT.

1. **NEGOTIABLE PAPER—INDORSEMENT BY THIRD PERSON, SECOND INDORSEMENT.**—In this State when a third person indorses a negotiable note before it is delivered to the payee, or indorsed by him, he is *prima facie* liable as a second indorser.—*Deering & Co. v. Creighton et al.*, 118.
2. **NEGOTIABLE PAPER—PRESUMPTION—PAROL EVIDENCE.**—But while in such case, when a third person so indorses a note, the liability is presumptively that of an indorser, it may be shown by parol evidence to be the liability of a joint maker according to the intention of the parties as disclosed by the facts.—*Id.*, 118.
3. **PLEADING—INDORSER—ORIGINAL PROMISOR.**—The plaintiff cannot recover in such case unless their complaint contain special averments showing the facts relative to the transaction, which operates to charge the defendants as original promisors or joint makers. The defect cannot be obviated in the reply.—*Id.*, 118.

NEW TRIAL.

REFUSAL OF NEW TRIAL—NOT APPEALABLE ERROR.—The granting or refusing of a motion for a new trial rests wholly in the discretion of the court and cannot be reviewed upon appeal.—*McBride v. N. P. R. & Co.*, 64.

NONSUIT.

See PRACTICE, 1. See INSURANCE, 12.

NOTICE OF APPEAL.

From justice's court. See APPEAL, 1.
Assignment of error in. See APPEAL, 2.
When sufficient. See APPEAL, 8.
When insufficient. See APPEAL, 7.

NOTICE.

Of name of owner in mechanic's lien. See MECHANIC'S LIEN, 1.
See VENDOR AND VENDEE, 2.

OFFICER.

Wrongful act of. See MUNICIPAL CORPORATIONS, 41.
Fees of. See COSTS AND DISBURSEMENTS.

ORDINANCE.

Validity of. See MUNICIPAL CORPORATIONS, 7.
Pleading. See *Idem*, 6.

PARTITION.

1. **PARTITION—SEISIN.**—A plaintiff cannot bring a suit for the partition of land unless he be in the possession thereof. Such suit will not lie against one in the actual possession, who is holding adversely to the plaintiff. In such case the plaintiff must gain possession by action, if necessary, before he can maintain a suit for partition.—*Windsor v. Simpkins*, 117.
2. **PARTITION OF LANDS—STATUTE.**—The right to partition lands is regulated by statute in this State.—*Savage v. Savage*, 112.
3. **PARTITION—REVERSIONER OR REMAINDERMAN.**—Prior to the enactment of section 423, Hill's Code, a partition suit could not be maintained by a reversioner or remainderman, and the rule is unchanged by the Code.—*Id.*, 112.
4. **REVERSIONERS—REMAINDERMEN.**—They may be made *defendants* in a suit for partition, but there is no statute in this State which enables them to sue as *plaintiffs*.—*Id.*, 112.
5. **PARTITION—WHO MAY SUE.**—The right is only given to one having actual or constructive possession of lands sought to be partitioned. A remainderman or reversioner has neither, but simply an estate to vest *in futuro*.—*Id.*, 112.
6. **SEISIN—POSSESSION.**—Seisin and possession as now understood mean substantially the same thing. To constitute seisin in fact, there must be an actual possession of the land; to constitute seisin in law, there must be a right of immediate possession according to the nature of the interest.—*Id.*, 112.
7. **LIFE TENANT—RIGHT OF ENTRY—PARTITION.**—Where the life tenant is in possession and there is no present right of entry in the remainderman or reversioner, they are not constructively seised.—*Id.*, 112.

PAYMENT.

1. **JUDGMENT—LAPSE OF TIME—PRESUMPTION OF PAYMENT.**—In this State a judgment upon which no execution has been issued, nor attempt made to enforce the same for twenty years, is presumed to have been paid.—*Beckman v. Hamlin*, 383.
2. **PRESUMPTION—EFFECT OF.**—In such case, it is a presumption of law and can be rebutted only by some positive act of unequivocal recognition, like part payment, or a written admission, or at least a clear and well-identified promise, intelligently made, within the period of twenty years.—*Id.*, 383.

See TRUSTS, 3, 4 and 8.

PARTNERSHIP.

1. **PARTNERSHIP—DISSOLUTION—AGREEMENT.**—If, upon the dissolution of a partnership, it is agreed that the partner continuing the business shall pay the debts, such agreement is broken by mere non-payment, and the outgoing partner can maintain a suit for the breach without having paid anything himself. And if a clause be added to save harmless, the former is not merged in the latter, and the obligee can rest upon either.—*Miller v. Bailey*, 539.
2. **DISSOLUTION AGREEMENT—CASE IN JUDGMENT.**—When, by the terms of a dissolution agreement between B. and M., the latter retired from the firm and B. was to pay the outstanding debts and liabilities of the firm, and made a composition agreement with the firm's creditors whereby he was to pay fifty per cent of the firm's debts, upon payment of which B. was to be discharged but not M., and B. complied with the composition agreement and thereupon went to the principal creditor of the firm and asked him to sue B. & M. and collect his money from M., and upon the action being brought he made no defense and did not acquaint M. of the composition agreement or its terms, nor plead it himself as a defense, but made default, and M. paid a large sum of the partnership debts of B. & M.; *Acid*, that when sued for failing to comply with the dissolution agreement, B. was estopped from relying upon the supposed release created by the composition agreement, and the court declined to decide whether such release existed or not.—*Id.*, 539.

PERSONAL PROPERTY. See ATTACHMENT, 4.

PASSENGER AND CARRIER. See RAILROADS, 1.

PATENTS.

1. PATENTS—WHEN NOT REQUIRED TO BE RECORDED.—Patents from the Government or State do not come within the provisions of the recording laws of the State where, by the terms of the statute, they are not expressly included.—*Meacham v. Stewart*, 285.
2. PATENTS—WHEN TO BE RECORDED.—Section 8034 applies in terms to State deeds or patents, and expressly provides that the effect of recording them shall be the same as other deeds.—*Id.*, 285.
3. EFFECT OF RECORD—PRIORITY.—To give them like effect as other deeds, priority of record confers superiority of title to a subsequent *bona fide* purchaser of the same lands from the State.—*Id.*, 285.

See PUBLIC LANDS, 2.

PLEADING.

1. ACTION TO RECOVER REAL PROPERTY—WHAT COMPLAINT MUST CONTAIN.—Under the Code of Civil Procedure of this State it is only necessary for the plaintiff in an action to recover the possession of real property to set forth in his complaint the nature of his estate in the property, whether in fee, for life, or a term of years; if for life, for whose life; if for a term of years, the duration thereof; and to allege that he is entitled to the possession of the property and that the defendant wrongfully withholds the same from him to his damage in the sum claimed by him. It is also necessary to describe the property with sufficient certainty to enable the possession thereof to be delivered, in case a recovery be had.—*Mitchell v. Campbell*, 198.
2. ANSWER—WHAT MUST CONTAIN.—The defendant must deny the allegations of the complaint which he desires to controvert, and if he claims that the property belongs to him or another, or claim any license or right to the possession thereof, he must set forth the nature and duration of such estate or license or right with the certainty and particularity required in the complaint; which really is all the facts that need be pleaded in the complaint and answer.—*Id.*, 198.
3. EQUITY—SUIT TO RESTRAIN SALE OF ATTACHED PROPERTY—ANSWER—WHAT MUST CONTAIN.—And where, in a suit by the owner of the outstanding equity, which included the equitable title to the property, against attaching creditors and others to restrain them from selling it upon executions issued to enforce liens alleged to have been created against it by virtue of attachments proceeding in their favor and against a party in whom the legal title to the property remained; *held*, that an answer filed by them to the complaint in the suit, which merely traversed the plaintiff's allegations and did not set forth affirmatively the issuance of the attachments and other facts above mentioned and referred to, was insufficient to entitle them to claim to occupy the standing of purchasers in good faith of the property.—*Rhodes v. McGarry et al.*, 222.
4. PLEADINGS—CONFESSION AND AVOIDANCE NOT INCONSISTENT. Defenses in a pleading can only be adjudged inconsistent when they are so contradictory of each other that some of them must necessarily be false. Where a defendant in an answer denies positively the allegations of a complaint, and then pleads as a defense thereto new matter in the nature of confession and avoidance, the denial and new matter are not necessarily inconsistent with each other, as it is possible for both of them to be true.—*Snodgrass v. Andross et al.*, 236.
5. ANSWER—FAILURE TO REPLY TO NEW MATTER.—By failing to reply to new matter in an answer, every material fact that is well pleaded therein stands admitted, but legal conclusions need not be denied.—*Larson v. O. R. & N. Co.*, 240.

PLEADING (Continued).

6. **PROMISSORY NOTE—CONTRACT TO DELIVER WOOL.**—In an action on a promissory note which had appended to it on the same sheet of paper an agreement by the maker to deliver his entire wool clip for a particular year as security for the note, and which provided that the plaintiffs were to sell the same on commission and apply the proceeds in payment of said note; held, that a complaint which was sufficient in every other particular, but did not allege that the defendant failed to deliver the wool, or that it was insufficient to pay the debt, was good on demurrer.—*Sperry & Co. v. Lewis*, 260.
7. **DEFECTIVE PLEADING—"EXPRESS AIDER."**—A pleading which is defective by reason of the omission of some material allegation, may be aided by the pleading of the adverse party. If the omitted allegation be supplied by the adverse pleading, it is the same as if it were inserted in the party's own pleading.—*Ferrera v. Parker*, 141.
8. **PLEADING—UNCERTAIN ALLEGATION—REMEDY.**—Where the allegations of a complaint indicate a fact, and evidence thereof is admitted under it, an exception to its admission is not tenable although the allegations regarding the fact are vague and indefinite. The remedy of the defendant in such a case is by motion to compel the plaintiff to make the complaint more definite and certain.—*Freeborn v. Turner*, 106.
9. **PETITION—DEFINITION.**—A petition in common phrase is a request in writing and in legal language describes an application to a court in writing, in contradiction to a motion which may be made *viva voce*.—*Fenstermacher et al. v. State of Oregon*, 504.
10. **PLEADING—EXHIBITS.**—An exhibit may be made a part of a pleading by marking it so that it may be identified and reciting in the pleading itself that such exhibit is so marked and made a part of it, *aliter*, though filed with the pleading and numbered as schedule 1.—*Cuspary v. City of Portland*, 496.
11. **PLEADING—DEMURRER—ANSWERING OVER—VERDICT.**—Where a defendant demurs to the complaint, which, being overruled, answers over, and a verdict and judgment are rendered against him, the judgment will not be reversed on objection to the complaint on appeal, though some of its material allegations appeared to be legal conclusions, and the breaches in the writing declared upon were defectively assigned.—*Gschwander v. Cort*, 513.
12. **PLEADING—FRAUD.**—Unless fraud or illegality be pleaded and proven by a preponderance of the evidence, the writings executed by the parties must be enforced according to their legal import.—*Ked v. Levy*, 450.
13. **EQUITY—PLEADING—WHAT COMPLAINT MUST CONTAIN IN A SUIT TO REFORM WRITTEN INSTRUMENT.**—A complaint in a suit to reform a written instrument in consequence of a mistake in its execution, must allege facts; it must show that what the parties to the instrument mutually agreed to do, and wherein the writing fails to express their agreement, and that the mistake did not occur through any carelessness or negligence of the plaintiff; otherwise a demurrer to the complaint should be sustained.—*Hyland v. Hyland et al.*, 61.
14. **COMPLAINT—DEFECTIVE STATEMENT OF A CAUSE OF SUIT—WHAT IS.**—Where the plaintiff, a married woman, in a suit against her husband as defendant to have reformed a certain deed executed by him to her, alleged in her complaint that for a valuable consideration the defendant bargained and sold to her certain real property, that he promised and agreed with her that he would execute and deliver a deed conveying to her the said property during her natural life, and then to her heirs and assigns forever, and that the defendant executed and delivered to the plaintiff a deed of conveyance to the property, but by mutual mistake the words "and then to her heirs and assigns forever" were omitted from the deed; that the defendant instructed and directed the person who wrote the deed to insert the said words, but he inadvertently and through mistake omitted to write in the same; that the plaintiff relied upon the word of the defendant, and, being

PLEADING (Continued).

ignorant of business of that kind, did not read the deed nor find out the mistake until a short time before bringing the suit; *held*, that the complaint was faulty in not stating the terms of the agreement between the parties which the deed was given to effectuate, but that the fault only constituted a defective *statement* of a cause of suit, and not a defective *cause* of suit; and that therefore the defendant waived the defect by filing an answer to the complaint.—*Id.*, 51.

15. PLEADING—ANSWER—BONA FIDE PURCHASER.—In order to defeat an outstanding equity in real property by a plea that the defendant was the purchaser of the property in good faith, he must set forth in his answer the deed of purchase, the date, parties and contents briefly; that the vendor was seized in fee, and in possession; he must state the consideration, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed; and he must deny notice previous to and down to the time of paying the money and delivery of the deed. And where it was averred in the answer of a defendant in such a case, that at or about a certain date his grantor executed and delivered to him a deed of conveyance, conveying unto him the title to the property, and that he did on such date, without knowledge or notice of such equity, purchase the property in good faith and for a valuable consideration, and was absolute owner of it in fee simple; *held*, that it was insufficient to give the defendant the benefit of the claim that he was an innocent purchaser of the property without notice. *Held, further*, that evidence showing that the deed was made out in favor of the defendant without his knowledge, but immediately afterwards delivered to him, and after receiving it he promised and agreed that he would take care of the grantor his life-time in consideration of the property, and that he received knowledge of the equity about the time the deed was delivered, or soon afterwards, and the suit to enforce the equity was commenced within the next three months thereafter, did not prove that the defendant was an innocent purchaser of the property.—*Id.*, 51.

See MUNICIPAL CORPORATION, 6. See NEGOTIABLE INSTRUMENT, 2.

POLICE REGULATION.

When statute in nature of. See CRIMINAL LAW, 8.

PRACTICE.

1. JUDGMENT OF NON-SUIT ON DEFENDANT'S MOTION—WHEN IMPROPER.—Under section 216, Hill's Code, a judgment of non-suit on the defendant's motion is improper, if the defendant was required to produce evidence to meet the plaintiff's case.—*Ferrera v. Porks et al.*, 141.
2. EQUITABLE DEFENSE OF EJECTMENT AT LAW.—A defendant sued in ejectment might under that amendment use his equitable title defensively in an action at law, but he could use it for no other purpose. A court of law under that provision cannot administer complete relief in favor of such equitable owner by decreeing specific performance when proper or necessary. In such case a judgment at law does not stop or preclude the party against whom it is rendered from demanding of the defendant, in a separate suit in equity brought for that purpose, a conveyance of the legal title, where the same was acquired by the defendant with notice of the plaintiff's equitable rights.—*Spaur v. Mc Bee*, 76.
3. PRACTICE—STATUTE OF LIMITATIONS—DEMURRER.—Where it is apparent on the face of a complaint that the action was not commenced within the time limited by the Code under subdivision 8 of section 67, Hill's Code, the objection must be taken by demurrer, and under section 71, if not so taken, it is waived and cannot be taken by answer. Under that section it is only where the objection does not appear on the face of the complaint that the same is to be taken by answer. *Hill v. Cooper*, 6 Or. 182, approved and followed; and *held further*, that the amendment to section 382, Hill's Code, made in 1878, has not impaired the authority of said case or rendered the same inapplicable.—*Id.*, 76.

XIX. OR.—40.

PRACTICE (Continued).

4. CAUSES OF ACTION TO BE SEPARATELY STATED—WHEN DEFECT CURED.—While, under the Code, each cause of action must be separately stated with the relief sought so as to be intelligently distinguished; yet, where the corporate existence of the defendant and the ownership of its road is not only made certain by reference but the answer supplies the defect in each count; *held*, that in the absence of a demurrer specifying the objection after the evidence was submitted, the objection comes too late.—*Eaton v. O. R. & N. Co.*, 391.
5. CROSS-BILL—WHEN PERMITTED.—A defendant in an action at law has no right to file a complaint in equity, in the nature of a cross-bill, unless the complaint shows that he "is entitled to relief, arising out of facts requiring the interposition of a court of equity and material for his defense"; and where it appeared from the complaint filed in such a case that the facts alleged, if true, would be available as a defense in the action at law; *held*, that a general demurrer to the complaint was properly sustained.—*Sheffield v. Weathered*, 172.
6. APPEAL—WHEN IT LIES FROM DECREE DISMISSING CROSS-BILL.—*Held*, also, that a decree dismissing such a complaint after a demurrer to it had been sustained and the plaintiff had not answered over, was a final decision from which an appeal would lie to the supreme court.—*Id.*, 172.
7. MOTION FOR NEW TRIAL—RULING NOT REVIEWABLE.—The ruling of the trial court in refusing a new trial presents no question for review on appeal.—*McQuaid v. P. & V. R. Co.*, 535.

See CRIMINAL LAW, 2.

PROBATE COURT. See EXECUTORS AND ADMINISTRATORS, 3 and 4.

PRINCIPAL AND AGENT. See INSURANCE, 1, 2, 3, 4.

PRINCIPAL AND SURETY.

1. PRINCIPAL AND SURETY—SEPARATE MORTGAGES BY EACH TO SECURE PRINCIPAL'S DEBT.—Where the principal and surety have both mortgaged property to secure the debt of the principal, the surety is entitled to have the property of the principal sold first and applied in satisfaction of the debt.—*Kel v. Levy*, 450.
2. SURETY—SUBROGATION.—When the principal and surety each mortgages his own property as security for the debt of the principal, and the surety pays the debt, the principal's mortgage given to secure such debt passes to the surety by operation of law. He is subrogated to all of the rights of such creditor.—*Id.*, 450.

PUBLIC LANDS.

1. RAILROAD—RIGHT OF WAY THROUGH THE PUBLIC LANDS OF THE UNITED STATES—ACT OF MARCH 3, 1875.—To entitle a railroad company to a right of way through the public lands of the United States as against one in possession of such lands, it must appear that such railroad company complied with the act of congress of March 3, 1875—that is, it must have filed with the secretary of the interior a copy of its articles of incorporation and due proof of its organization under the same, and it must also have claimed the benefits of said act by filing with the register of the land-office of the proper district a profile of its road.—*Larsen v. O. R. & N. Co.*, 240.
2. PUBLIC LANDS—PATENT—COLLATERAL AND DIRECT ATTACK.—In an action of ejectment, a patent for land granted by the United States cannot be collaterally attacked; but it may be attacked by a direct proceeding in equity, based on mistake of the law in its issuance or fraud and imposition in its procurement.—*Sanford v. Sanford*, 1.
3. SAME—FRAUD—TRUSTS—INJUNCTION.—Under this rule, where it appeared that after A and B had filed upon separate adjoining tracts of land, A, without the knowledge of B, had his entry amended so as to cover both tracts, notwithstanding B was and had been rightfully in possession of the tract entered by him, and

PUBLIC LANDS (Continued).

by such means A fraudulently obtained a patent for B's tract; *held*, that A would be considered a trustee of the legal title for B as to such tract, and that an action of ejectment to recover such tract brought by A against B would be enjoined.—*Id.*, 1.

See *HOMESTEAD*, 1 and 2.

RAILROADS.

1. **PASSENGER AND CARRIER.**—A person who has purchased no ticket and paid no fare who goes to a caboose attached to a freight train, and without the knowledge of those in charge of such train, attempts to get into such car at a place where the railroad company is not accustomed to receive passengers, is not a passenger; and if he is injured in such attempt to board the train, and those in charge of it have no knowledge of his presence, the company is not liable for the injury.—*Haase v. O. R. & N. Co.*, 354.
2. **RAILROAD CROSSING—DUTY OF TRAVELER TO LOOK AND LISTEN.**—It is the duty of a traveler to look and listen before attempting to cross a railroad track, and especially at a crossing known to him to be dangerous from its obstructed view and the conformation of its surroundings rendering it difficult to hear.—*McBride v. N. P. R. R. Co.*, 64.
3. **RAILROAD CROSSING—MUTUAL DUTIES.**—While it is the duty of travelers when about to cross a railroad track to exercise proper care and caution by using their sense of sight and hearing, it is likewise the duty of those to whom is committed the control and supervision of the movements of the train to exercise such care and caution at such crossings, and to give the warning signals so as to prevent injury to those traveling on the highway.—*Id.*, 64.
4. **COMPANY OWNING OR OPERATING UNFENCED ROAD LIABLE FOR STOCK KILLED.**—The purpose of our statute is to make the railroad company owning the road, or the company operating the road, liable, so that either may be sued, as the plaintiff may elect, who has sustained injury to his live stock by a moving train upon its unfenced track.—*Eaton v. O. R. & N. Co.*, 391.
5. **ACTION FOR KILLING STOCK ON UNFENCED ROAD—PLACE OF ENTRY NEED NOT BE ALLEGED.**—Under the statute for killing or injuring live stock on an unfenced track; it is not necessary to allege the point at which the animals entered upon the track of the railroad.—*Id.*, 371.
6. **PLACE OF ENTRY—WHEN PROOF OF UNNECESSARY.**—Nor is proof of entry material except where stock is killed at a place where the company is not bound to fence, as a public highway, which has entered where its track was unfenced, and the duty to fence existed, and such killing is the direct consequence of the neglect to fence.—*Id.*, 371.
7. **UNFENCED ROAD—WHAT IS SUFFICIENT PROOF OF NEGLIGENCE.**—When it is alleged and proved that the company failed to fence, and that the plaintiff's stock was killed or injured upon or near such unfenced track by a moving train, the negligence is established and can only be defeated by proof of contributory negligence or misconduct.—*Id.*, 371.
8. **RAILROADS—WHEN THE DUTY TO FENCE IS IMPLIED.**—A statute which prescribes, as a precautionary measure, what shall be deemed a sufficient fence to protect a railroad track from the entrance of live stock, and declares an absolute liability for the killing of stock for the failure to fence, or for killing stock on an unfenced track, except for contributory negligence, or misconduct, imposes by implication the duty to fence as much as if such duty was expressly declared.—*Sullivan v. O. R. & N. Co.*, 319.
9. **SECTIONS 4044, 4045, AND 4048, HILL'S CODE, CONSTRUED.**—Section 4044 makes a railroad company liable for the value of stock killed upon or near any unfenced track by a moving train, and section 4045 prescribes what shall be deemed a sufficient fence to guard the railway track from the entrance thereon of live stock.

RAILROADS (Continued).

and section 4048 provides that in every action for the value of any stock mentioned in section 4044, so killed, that proof of such killing shall be deemed and held conclusive evidence of negligence, except when the owner is guilty of negligence or misconduct; *held*, that the statute in prescribing the fence, and declaring that stock killed "on or near any unfenced track" shall be conclusive evidence of negligence, by implication, makes it the duty of a railway to fence its track. A statute often speaks as plainly by inference and by means of the purpose which underlies the enactment as in any other manner.—*Id.*, 319.

10. RAILROAD COMPANY—DUTY TO FENCE ROAD—POLICE REGULATIONS.—Such a statute is intended as a precautionary measure to protect the track from stock where allowed to roam at large so as to insure safety in the running of the trains as well as to prevent the destruction of live stock, and is a police regulation which finds its authority in the same power as regulates the storage of gun powder, or other dangerous instrumentalities, and is not obnoxious to the constitutional objection of depriving the company of its property without due process of law, or of denying it the equal protection of the laws.—*Id.*, 319.
11. HINDMAN v. R. R. Co., 17 Or. 619, APPROVED AND FOLLOWED.—Under the statute in view of the construction given in *Hindman v. Railroad Co.*, 17 Or. 619, when it is alleged and proven that stock is killed or injured at a place where the company has failed to fence, but the duty existed,—an unfenced track,—a case of negligence is made out unless the defendant can show contributory negligence or misconduct.—*Id.*, 319.
12. PLACE OF ENTRY OF STOCK ON TRACK—WHEN MATERIAL.—Proof of the place of entry of the stock only becomes material and devolves on the plaintiff when stock is killed or injured at a place where the railroad company is not bound to fence, as a public highway, which has entered where its track was unfenced and the duty to fence existed, and such killing or injury is the direct consequence of omission to fence.—*Id.*, 319.
13. RAILROAD—FENCE.—A railway company is not required, under the statute, to fence its depot: Following *Moses v. R. R. Co.*, 18 Or. 386.—*Fisk v. N. P. R. R. Co.*, 163.

See PUBLIC LANDS, 1. See TRESPASS.

REAL PROPERTY.

1. WHEN SALE MADE BY ADMINISTRATOR TO PAY DEBTS NOT NECESSARILY VOID.—A sale of real property belonging to the estate of a deceased person, made by an executor or administrator thereof, under an order of a county court sitting in probate, and having jurisdiction over the estate, is not necessarily void although the petition for the order of sale, the citation to the heirs, and the service of the citation are defective.—*Mitchell v. Campbell*, 198.
2. IRREGULARITIES IN SALE BY ADMINISTRATOR—WHEN CURED BY ACTS OF 1874 AND 1878.—Such defects under the curative acts of 1874 and 1878 should be disregarded where the property sold at such sale has been purchased for a valuable consideration which has been paid by the purchaser to the executor or administrator or his successor in good faith, and the sale has not been set aside, but has been confirmed or acquiesced in by the court.—*Id.*, 198.
3. DEFECTS IN SALE BY ADMINISTRATOR WHICH MAY BE CURED BY LEGISLATION AND WHICH CANNOT BE.—The legislature has no power to make valid, by a retroactive statute, that which is inherently a nullity, nor render a sale of property efficacious when made in manner which it had no power to authorize; but when the sale is void merely in consequence of a failure to comply with the conditions upon which the power to make it was delegated by the legislature, and which it could have dispensed with in the beginning, and the sale been valid, it can, by the adoption of such a statute, legalize it.—*Id.*, 198.

See VENDOR AND VENDEE, 1, 5 and 6.

REFEREE.

1. **REFEREE'S REPORT—WHEN MAY BE SET ASIDE.**—The provisions of the Code of this State, to the effect that the court may affirm or set aside the report of a referee in whole or in part, and may make another order of reference as to all or so much of the report as is set aside, to the original referees or others, or may find the facts and determine the law itself and give judgment accordingly; and that upon a motion to set aside the report, the conclusions thereof shall be deemed and considered as the verdict of a jury, only authorizes the court to set aside such report as to conclusions of fact, under the same circumstances in which it is authorized to set aside the verdict of a jury and grant a new trial, which it is authorized to do when the verdict is against the great weight of evidence.—*Merchants National Bank v. Pope*, 35.
2. **REFEREE'S REPORT—DUTY OF THE COURT WHEN SET ASIDE.**—Where the court sets aside the report of a referee in whole or in part, and elects to find the facts and determine the law itself, it is its duty to find the facts and conclusions of law in the same manner as it is required to do when it tries a case without the intervention of a jury.—*Id.*, 35.
3. **FINDINGS—EFFECT OF.**—The findings of a referee are conclusive as to the facts found if there is any evidence before him having a tendency to establish such facts.—*Bartel v. Mathias*, 482.

RECEIVER.

RECEIVER—SALARY.—When the parties to a litigation by their attorneys ask the appointment of a person as receiver who is an interested party and represent to the court that his appointment would save the salary to the estate of the receiver then in office, and the court makes such appointment, and he serves as such receiver until removed without making any claim for compensation, upon an application to the court after such removal to be allowed a salary during the time he so served, and the court below refused to make such allowance; *held*, that no error was committed.—*Steele v. Holladay*, 517.

REGISTRATION. See **PATENTS**, 1, 2, 3.

REPLEVIN.

1. **REPLEVIN—WHAT TITLE SUFFICIENT TO SUSTAIN IT.**—In an action to recover the possession of personal property, the plaintiff ordinarily must show that he is the owner of the property, or is lawfully entitled to the possession of it by virtue of a special property therein. The ownership, however, requisite to maintain such an action need not be absolute; a right to the possession and dominion over it for the time is all that is essential.—*Lewis v. Birdsey et al.*, 164.
2. **REPLEVIN—POSSESSION—EFFECT OF—TAKING BY THIRD PERSON.**—Hence where one person is in possession of personal property exercising dominion over it, and another takes and carries it away without his consent, the former may maintain an action against the latter to recover the possession of the property, although in fact it belongs to a third person, unless the latter can justify his taking of the property by showing such a privity existing between him and the owner as would entitle him to represent the owner's interest in it.—*Id.*, 164.

RIPARIAN RIGHTS. See **HOMESTEAD**, 3.

RIGHT OF WAY. See **PUBLIC LANDS**, 1.

RETURN.

When sufficient. See **ATTACHMENTS**, 1.

Amendment of. See **ATTACHMENTS**, 3.

ROAD. See **COUNTY COURTS**.

SALES.

1. **SALE—WHEN TITLE PASSES.**—Ordinarily where there is a sale of goods by number, weight or measure, at so much a piece, a pound, a cord or bushel, it is necessary, in the absence of evidence showing a different intention, that the things should be counted, weighed or measured before the price to be paid can be ascertained. Before this is done, the sale is not so consummate and perfect as absolutely to change the property, but the goods still remain at the risk of the vendor.—*Rosenthal Bros. v. Kahn Bros.*, 571.
2. **CASE IN JUDGMENT.**—Where R. agreed in writing to furnish K. 2,900 cords, more or less, of good, sound merchantable fir wood at the rate of \$1.90 per cord on board the cars at or between Clarnie or Fairview, said wood to be measured and received by the quartermaster at Walla Walla, W. T.; held, that the title to the wood did not pass to K. until received and measured by the quartermaster at Walla Walla.—*Id.*, 571.
3. **SALE OF PERSONAL PROPERTY—TITLE PASSES.**—In the sale of personal property where there has been a complete delivery of the property in accordance with the terms of sale, and nothing remains to be done in relation to the property to effect the transfer, the title passes, although there remains something to be done in order to ascertain the total quantity or value of the goods at the price specified in the contract.—*Barr v. Borthwick & Frame*, 578.
4. **EVIDENCE—COMPETENCY—QUALITY OF GOODS.**—In an action for wood sold, where the defense is that wood was not of the quality specified in the contract, evidence is inadmissible by the plaintiff to show the merchantable quality of wood of the same grade, cut from the same place, and on hand a day or two before the trial and some considerable time after the delivery of the wood sued for.—*Id.*, 578.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2. See ATTACHMENT, 5.

SHERIFF.

See MORTGAGE, 1. See DEED, 1.

STATUTE.

STATUTE—WHEN THE COURT WILL DECLINE TO LOOK AT THE JOURNALS TO SEE IF PROPERLY ENACTED.—After an act of the legislature has been in force many years, and recognized and acted upon by the courts in numerous instances without any question having been made as to the manner of its passage, the court will regard it as having been duly adopted, and will not look into the journals of the two houses of the legislature in order to ascertain whether the bill for the act was read the number of times required by the constitution, or whether amendments proposed in one house were adopted by the other.—*Mitchell v. Campbell*, 198.

STATUTE OF LIMITATIONS.

1. **STATUTE OF LIMITATIONS—DISABILITY.**—The act of the legislative assembly of the State, entitled, "An act to amend sections four and seventeen of chapter one of the Code of Civil Procedure, relating to the time of the commencement of an action to recover the possession of real property, approved October 17, 1878," limits such time to ten years only in case the party entitled to commence the action labor under none of the disabilities specified therein, one of which is, that the party at the time the cause of action accrued was a married woman.—*Mitchell v. Campbell*, 198.
2. **A MARRIED WOMAN HAS FIFTEEN YEARS IN WHICH TO COMMENCE AN ACTION TO RECOVER HER REAL PROPERTY.**—When a plaintiff, a married woman, brought an action against a defendant to recover the possession of certain real property, claiming to be the owner in fee of five-ninths thereof, four of the ninths by purchase from certain heirs to the property, the other ninth by inheritance, and alleged that the other four-ninths belonged to certain other heirs of the estate; and the defendant set up as a defense adverse possession of the property, and it

STATUTE OF LIMITATIONS (Continued).

appeared that none of the heirs to the estate were under any legal disability except the plaintiff, who was such married woman at the time her right of action accrued and during all the time of the adverse possession; *held*, that the plaintiff was entitled to the full period of fifteen years in which to commence the action in which to recover the ninth interest inherited by her; but that ten years' adverse possession was a sufficient time to bar the right to recover any of the other interests in the property: and that an instruction of the court upon the trial of the action, that ten years' adverse possession was sufficient to bar the plaintiff's right of recovery without exception in regard to the ninth interest inherited, was error; *held, further*, that while the error affected only said ninth interest, yet it could not be corrected on appeal without a reversal of the entire judgment and directing a new trial; *held, also*, that adverse possession of real property for the period prescribed by the statute of limitations vests a perfect title in the possessor as against the former holders of the title. The decision upon the point in *Parker v. Metzger*, 12 Or. 409, approved.—*Id.*, 198.

3. STATUTE OF LIMITATIONS—RIGHT OF ACTION.—The statute of limitations begins to run when the right of action is complete, and this being so, a right of action accrued upon each of these matters when the services were rendered and each transaction closed.—*Bartel v. Mathias*, 482.

See PRACTICE, 3.

SURETY.

Affidavit of. See APPEAL, 2.

Justification of. See APPEAL, 4.

See PRINCIPAL AND SURETY, 1 and 2.

SUBROGATION. See PRINCIPAL AND SURETY, 2.

SUMMONS.

Objections to service. See APPEARANCE.

TIME CHECKS.

Value as evidence. See EVIDENCE, 4.

TITLE.

When passer. See SALES, 1 and 3.

See EVIDENCE, 7.

QUANTUM MERUIT. See CONTRACT, 7.

TRESPASS.

TRESPASS—CONSTRUCTION OF A RAILROAD THROUGH ONE'S LAND WITHOUT HIS CONSENT—MEASURE OF DAMAGES.—When a railroad company, without the consent of the owner of land, constructs its road over and across such owner's land and runs its cars thereon and no special damages are alleged, the correct measure of damages is the difference between the annual rental value of the premises with the railroad track down and the road operated as it is, and what the rental value of the premises would have been if the road had not been there; and when it also appeared that the defendant, in effecting an entry, broke the plaintiff's close, but no special damages are alleged, the measure of damages for such breaking would be such sum as would restore the premises to such a condition of safety for use as they were in before such breaking.—*Larsen v. O. R. & N. Co.*, 240.

TRIAL.

JURY TRIAL—WAIVER OF—POWER OF THE COURT.—A circuit court has no authority to try an action at law involving an issue of fact without a jury, unless a jury trial is waived in the manner provided in the Civil Code. If such court deems such a case a proper one to be determined upon the law, it must direct the jury to return a verdict in favor of the party which the court considers entitled to it under the proofs.—*American Mortgage Co. v. Hutchinson et al.*, 334.

TRUSTS.

1. **TRUST—WHEN RESULTING.**—When land is conveyed to one person and another pays the consideration, a resulting trust will be presumed in favor of the one paying the consideration. It rests on the equitable principle that the property belongs to him who advances the money to pay for it.—*Taylor v. Miles*, 550.
2. **PAROL EVIDENCE—WHEN NOT ADMISSIBLE.**—As the trust results from the payment of the consideration, if the party claiming to be the beneficial owner has made no payment he cannot show by parol evidence that the purchase was made for his benefit, for that may not involve any thing more than a breach of a parol agreement to purchase and hold in trust for another.—*Id.*, 550.
3. **PAYMENT NEED NOT BE IN MONEY.**—It is not essential that the payment of the consideration be in money, but it may be made in anything of value.—*Id.*, 550.
4. **PRESUMPTION OF PAYMENT WHEN BETWEEN STRANGERS.**—The presumption that the party paying for the property intended it for his own benefit applies only when the transaction is between strangers, where there is no moral or legal obligation resting on the purchaser to pay the consideration for another.—*Id.*, 550.
5. **WHEN INTENDED AS AN ADVANCEMENT.**—When the purchaser takes conveyances in the name of his wife, the rule is reversed, and equity raises the presumption that the purchase and conveyance was intended as an advancement or gift.—*Id.*, 550.
6. **CONVEYANCE TO WIFE—WHEN EFFECT TO HINDER CREDITORS.**—If a purchaser takes a deed in the name of his wife for the purpose of hindering and delaying his creditors, and not for the purpose of making an advancement, a trust will result to the purchaser, and the land be liable for his debt.—*Id.*, 550.
7. **CONVEYANCES WITHOUT CONSIDERATION.**—The law enforces a careful regard for the rights of creditors against conveyances without consideration made by a party largely indebted, and unless he makes provision for the payment of his debts or retains other property of sufficient value for that purpose, they are of no validity as to such creditors.—*Id.*, 550.
8. **WHETHER PAYMENT OF THE DEBT PURGES THE FRAUD, NOT DECIDED.**—Whether a party largely indebted can put his property in the hands of another to hold until he can pay his debts, and when the debts are so paid the transaction will be relieved of its fraud, not decided.—*Id.*, 550.
9. **CASE STATED.**—Where a party, in order to secure his property against the claims of his creditors, conveyed it to another to hold until he could pay his debts, and after such debts were paid, directed it to be conveyed to his wife, and subsequently joined with her in a deed in exchanging said property for other property with C.; held, that no trust resulted to him in such property.—*Id.*, 550.

See VENDOR AND VENDEE, 3.

UNDERTAKING ON APPEAL.

Affidavit of surety. See APPEAL, 1, 2.

VENDOR AND VENDEE.

1. **BONA FIDE PURCHASER FOR VALUE OF LANDS—WHO IS NOT.**—A person who has taken a contract in writing for lands, but who has paid nothing thereon, and has taken no deed for the same, is not a bona fide purchaser for value.—*Schetter v. Southern Or. Co.*, 192.

VENDOR AND VENDEE (Continued).

2. AGENCY—CONTRACT—NOTICE.—A director of a corporation who contracts with another director of the same corporation concerning the company's property who was also business manager with certain enumerated and limited powers. is chargeable with notice of any defect in the manager's power to make said contract.—*Id.*, 192.
3. TRUSTEE AND CESTUI QUE TRUST—DIRECTOR OF CORPORATION.—A director of a corporation acts in a trust capacity towards all the stockholders of the corporation and in respect to all of its property. A trustee cannot so deal with trust property as to make profit for himself. His duties as trustee require him to so manage and conduct his trust as to realize whatever profits that may accrue in the course of the business for the benefit of the *cestui que trust*. This he could not do if he were permitted to acquire the trust property for himself.—*Id.*, 192.
4. COMPENSATION FOR IMPROVEMENTS—PARTY.—The plaintiff claims to have had a contract for the purchase of certain lots, and agreed in writing to sell one of said lots to the lodge of Odd Fellows in the town, and placed the lodge in possession and covenanted to protect such possession. The lodge then placed on said lots lasting and valuable improvements. *Held*, that the plaintiff could not recover the value of said improvements placed on said lots by the lodge.—*Id.*, 192.
5. SECTION 3027, HILL'S CODE, CONSTRUED—BONA FIDE PURCHASER—WHO IS.—A subsequent purchaser against whom an unrecorded conveyance is void, under section 3027, Hill's Code, must be a purchaser in good faith and for a valuable consideration of "the same real property, or a portion thereof," included in the unrecorded conveyance; and must be a purchaser under a form of conveyance or other instrument, which purports to convey the property. Hence a purchaser under a mere quit-claim deed, which only purports to remise, release and quit-claim the right, title and interest of the grantor in and to the property, will not be regarded "a purchaser of the same real property or any part thereof."—*Ans. Mont. Co. v. Hutchinson et al.*, 334.
6. CASE IN JUDGMENT.—Where F. was owner of a parcel of land which he conveyed to E., but E. having failed to pay for the land conveyed it back to F., who neglected for several years thereafter to record the deed, and in the meantime F. executed a deed of quit-claim to D., who took the deed without actual notice of the prior conveyance by E. to F., except such as might be presumed or inferred from the character of the deed or the condition of the deed record of the county, and D. thereafter executed a quit-claim deed to the land back to E., who then executed a like deed to the land to W., who finally executed a deed of warranty to it to C., and several quit-claim deeds were thereafter made to it by C. and his grantees, containing covenants of warranty against the grantors, and it was finally purchased by the respondent under a mortgage foreclosure against some of the intermediate claimants,—the land during all the time remaining vacant and unoccupied; *held*, that the said deeds did not constitute the grantees therein purchasers of the same real property or any part thereof, conveyed by E. to F., within the meaning of said section of the Code. *Quære*, whether if E., when he executed the deed to D., had had possession and seisin of the land, and D. had taken possession thereof under the deed to him, it would have constituted him such subsequent purchaser under said section of the Code.—*Id.*, 334.

VENUE.

Change of. See CRIMINAL LAW, 11, 12.

VERDICT.

FINDINGS OF FACT TO BE DEEMED VERDICT.—When a case is tried before the court without the intervention of a jury, the findings of the court upon the facts shall be deemed a verdict, and the duty of this court is to ascertain whether the legal conclusions drawn therefrom are such as the law pronounces.—*Kyle v. Rippy & Amy*, 186.

WAIVER. See INSURANCE, 9, 10 and 12.

Of defect, when causes of action not separately stated. See PRACTICE, 4.

Of jury trial. See TRIAL.

WATER RIGHTS.

1. **WATER RIGHTS—AGREEMENT AS TO USE.**—An agreement between parties who have settled upon lands in the vicinity of a stream of water capable of being utilized for the purpose of irrigation as to the appropriation of the water for such purpose and as to the relative quantity which each shall be entitled to use; and such agreement has been acted upon for a long time by the parties, and a violation of it by any of them would produce irreparable damage to others, will be enforced in a court of equity.—*Combs v. Clayton*, 99.
2. **CONTIGUOUS OWNERS—MUTUAL USE OF WATER—TACIT AGREEMENT.**—Where certain parties settled upon lands as above mentioned and their lands would have been of little if any value without irrigation, and they cooperated in constructing dams and digging ditches for the purpose of conveying the water on to their respective parcels of land in order to irrigate them; *held*, in the absence of direct proof to the contrary, that it was evidence of a tacit agreement between them that each should be entitled to enjoy an equal share of the water which the stream afforded, which a court of equity in a proper case would enforce.—*Id.*, 99.

See HOMESTEAD, 3.

WILL.

1. **WILL—WHAT CONSTITUTES—PROBATE—WHAT NECESSARY.**—Under the statute of Oregon, every will, in order to be effective, is required to be in writing, signed by the testator, or by some other person under his direction in his presence, and attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator. And in order to admit the will to probate, it must be proven to have been so signed and attested, and that the testator in the case of the disposal of goods and chattels, was over the age of 18 years; and in the case of the disposal of real property, was 21 years of age and upwards, and was of sound mind.—*Luper v. Werts & al.*, 122.
2. **ATTESTING WITNESSES—WHO IS.**—To prove the attestation of the will, it must be shown that the witnesses who subscribed their names to it did so at the request of the testator; that they saw him sign it, heard him acknowledge it, or observed acts which unmistakably indicated that he had signed it. The acknowledgment, however, cannot be inferred from mere silence.—*Id.*, 122.
3. **PROBATE OF WILL—WHAT EVIDENCE NECESSARY.**—The proof of a will should not fail because the testimony of the subscribing witnesses thereto is insufficient to establish its execution, provided it can be proven by other competent evidence, or by circumstances clearly indicating its execution; but where such proof is not made, courts have no more authority to adjudge the will effective than they would have to attempt to enforce an oral expression of a party regarding the disposition which should be made of his property at his death.—*Id.*, 122.

WILL. See DEED, 2 and 3.

WITNESS.

WITNESS—EXPERT.—An expert is one instructed by experience, and to become such requires a course of previous habit and practice or of study so as to be familiar with the subject.—*Pendleton v. Saunders & al.*, 9.

See WILL, 2.



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